NUMBER 2

INDIAN SOVEREIGNTY

Proceedings of the Second Annual Conference on Problems and Issues Concerning American Indians Today

edited by William R. Swagerty

THE NEWBERRY LIBRARY CENTER FOR THE HISTORY OF THE AMERICAN INDIAN

SECOND ANNUAL CONFERENCE

PROBLEMS AND ISSUES CONCERNING AMERICAN INDIANS TODAY

INDIAN SOVEREIGNTY

Conference Chairman: Professor Alfonso Ortiz (San Juan Tewa)
Department of Anthropology
University of New Mexico
Chairman, Advisory Committee, NLCHAI

Morning Session, Saturday, May 5, 1979. 9-12 A.M. Lake Shore Drive Hotel

"Sovereignty in History and Legal Theory"

Chair: Professor Charlotte Heth (Oklahoma Cherokee)
Director, American Indian Studies Center
University of California, Los Angeles
Fellow, NLCHAI, 1978-1979

Paper: Sovereignty in Anglo-American History
Francis Jennings, Director, NLCHAI

Paper: Tribal Sovereignty under United States Law
Arthur Lazarus, Jr., Counsel, Association on American Indian Affairs

Comment: James Youngblood-Henderson (Cheyenne/Chickasaw)
Treaty Historian, Union of Nova Scotia Indians

Lunch. 12:30 P. M. The Newberry Library

Afternoon Session, 2 P. M. The Newberry Library (Fellows' Lounge)

"What Sovereignty Means to Indians Today"

Chair: Susan Power (Yanktonai Sioux)
University of Chicago *Law Review*

Paper: Relations Between Indian Tribes and the Nation
Wendell Chino, President, Mescalero Apache Tribe

Paper: Preservation of Tribal Culture and Identity
John Redhouse (Navajo), National Indian Youth Council

Summary: Chairman Alfonso Ortiz

Reception and Refreshments Following

EDITOR'S PREFACE

These proceedings record the SECOND ANNUAL CONFERENCE ON PROBLEMS AND ISSUES CONCERNING AMERICAN INDIANS TODAY. The proccedings of the FIRST ANNUAL CONFERENCE could not be published because of the inadequacy of the tape recorder used then. For the record, it was held May 5-6, 1978, at the Newberry Library, on the subject of *TRIBALISM*. Eighty-five people in addition to eleven participants attended the two day meeting. Papers and comments were presented by the following individuals:

Henry F. Dobyns, anthropologist
Russell Thornton, sociologist
William H. Veeder, attorney
Faith Smith, educator-administrator
Alvin Josephy, Jr., editor and author
Abbott Sekaquaptewa, tribal chairman
Sam Deloria, lawyer and educator
David Beaulieu, educator-administrator
David Edmunds, historian
Ernest L. Stevens, tribal leader and government official
Francis Jennings, Center Director and conference chairman

The following text is a complete transcript of what was said on May 5, 1979, at the SECOND CONFERENCE where the recording equipment better served its purpose. Even so, the tapes were not always clearly audible. I have listened to the tapes many times and have tried to identify what was said with the proper speakers. In editing, I have tried to retain the personality and flavor of each speaker, making changes only to clarify otherwise unintelligible comments. I request some tolerance for error, and apologize if I have unwittingly misrepresented any speaker's intentions. The proceedings are as objectively accurate as physical circumstances permitted.

We at the Center for the History of the American Indian hope that these proceedings will provide new insights for those who were unable to attend the conference, and will give contemporary perspectives on a subject that has deep historical roots.

William R. Swagerty
The Newberry Library
December, 1979

INTRODUCTION

Dr. Charlotte Heth, Director of Indian Studies, U.C.L.A.:

We would like to welcome everyone to the Second Annual Conference. This year's topic will be on tribal sovereignty. This morning we will have three different points of view on the question of tribal sovereignty. First of all, Francis Jennings, Director of The Newberry Library Center for the History of the American Indian; secondly, Arthur Lazarus Jr., Legal Counselor for the Association on American Indian Affairs; and thirdly, James Youngblood Henderson, Treaty Historian, Union of Nova Scotia Indians. I think there are a few announcements that might be made. The afternoon session will be at the Newberry, and that's where we'll also have lunch. The reception after the afternoon session has been moved forward a little bit so we will have Dr. Ortiz's Conference summary before the reception and no evening session tonight, so you might need to know that for your planning later on. The morning session is called "Sovereignty in History and Legal Theory," and our first speaker is Francis Jennings. He has written The Invasion of America and other works on Colonial Indian-White relations. Jennings will speak to us on the general subject, "Sovereignty in History."

Dr. Francis Jennings:

Thank you. My function is more or less to make sure you don't fall asleep during the day and so I have quite deliberately written a piece that is, I think, somewhat provocative. I don't mind if you heave a bomb or two in return.

"Sovereignty in Anglo-American History."

What Indians mean by sovereignty is different from what courts mean by it. Indians want the power to rule themselves in their own way in their own territories. They want political independence for their tribes. Courts have much more elaborate definitions that have developed out of many centuries of history in England and America. These are intricately involved with lawyers' and judges' conceptions of law and the authority by which law is made. As a historian, I propose to look at sovereignty in a way that takes into account both the Indians' and the lawyers' concerns: the issue of power and the issue of law. They seem to me to be only different faces of the same historical problem.

Let me begin by distinguishing sharply between historical events and legal theory. In theory sovereignty is the final highest power of government that overrides all other interests and rights. In fact, however, legal sovereignty seems to take some knocks from people who pay little attention to theories. For instance, England has a theoretical sovereign, a Queen, who was crowned and anointed with great ceremony in Westminster Abbey. When the Prime Minister of England calls upon her, he addresses her as "Your Majesty," and he is very deferential. But when Her Majesty speaks to Parliament to suggest needed legislation, she reads a speech written by that Prime Minister. When he is a Conservative, so is she. When he leads the Labour Party, she becomes a Labourite also. When she graciously bestows a new title of nobility, she gives it to a person chosen by the Prime Minister. She is rather careful to conform to the Prime Minister's wishes. A few years ago, King Edward VIII conflicted with a Prime Minister and was suddenly demoted to be Duke of Windsor in exile. Now a

monarch who has to obey the orders of a commoner may still be sovereign in theory but plainly does not exert the powers of sovereignty in fact.

What about that Prime Minister then? Is he the true sovereign? Sometimes it seems so when he manipulates Parliament as he pleases, and there have been observers who noted that the Prime Minister seems to exert all the powers of sovereignty between elections. But he does have to keep Parliament behind him, and he can be overthrown by the voters.

Even Parliament is not really sovereign in the full abstract sense, in spite of English legal theorists who say that Parliament can do anything it wants to do. What it can do is to pass any law it feels like passing, but that is a long way from doing anything it wants to do. Parliament has been successfully defied twice by trade unions within the past decade: first in 1974 when Prime Minister Edward Heath, with Parliament's backing, told the coal miners that they could not get the wages they wanted. The miners struck, England was plunged into cold and darkness, and Parliament gave in. Indeed Mr. Heath and his Conservatives were presently turned out of power at an election. Today, Prime Minister Callaghan faces much the same challenge. With a Parliament led by the Labour Party he too has ordered limitations on what unions may demand in their contract negotiations, and he too has been defied by strike after strike. Like Heath, he too is capitulating. Instead of trying to suppress the unions by force, he tries to find a compromise limit that they will accept.

There are also less dramatic forces working independently of Parliament and sometimes at odds with it. The Bank of England makes decisions in complete secrecy, and what it decides about England's currency and financial policies can give Parliament multiple migraine headaches.

So Parliament is not really sovereign after all, not even between elections. Who is then? Obviously a number of powers are exerted autonomously at different times by different bodies of persons, so sovereignty as a social and political fact must be seen as a divided power. If it is supposed to be indivisible, it does not exist at all.

Let me stress that I am referring to sovereignty as a fact. In legal theory the thing is still very much alive. Every law is enacted by Parliament for the Queen to issue in her name, and every English judge assumes that the source of all legal power is the Queen in Parliament. One must distinguish between legal power and the kind of social or political power that works without legal sanction and sometimes illegally. Sometimes that extra-legal power can assume extreme forms as it did when certain legal subjects of King George III rebelled against his rule and seceded from his empire. At other times the legal and extra-legal powers contend within a set of tacitly accepted ground rules. Parliament does not turn the troops loose on the striking unions, and the unions do not try to overthrow Parliament. Both sides understand that bloody confrontation could cause both to lose more than either might gain. But somewhere in the muddle is another power also, still very much alive, of public opinion demanding that the contestants keep within the bounds prescribed by custom.

I do intend to apply the lessons of this foreign land to the problem of sovereignty as it concerns Indian peoples in the United States today, but please bear with me a while longer in order to consider this matter of folk custom. In the England of the Anglo-Saxons, after the Romans withdrew, custom was the Law, and it was so called. The kings of Essex and Wessex and Kent and so on were not the powerful monarchs of Tudor-Stuart times. These old kings got their name because they were chiefs of kins or kindreds;

their primary function was to lead the kindred's warriors and to divide up the spoils of war among them. When justice was to be dispensed the king and his counselors searched for precedent in old custom, and when they found it they declared it as the Law. They did not make law, they discovered it. They probably fudged a little sometimes to make advantages for themselves when custom was not very specific, but they had to keep within the bounds of what the people remembered as the rights of their ancestors.

It took many centuries and much historical development before this conception of law gave way to the one that now prevails. The Normans of William the Conqueror established a feudal system of government, but their kings were still bound to certain duties and responsibilities by custom and contract, and the great lords frequently rebelled to reassert old rights or acquire new ones. Magna Carta is our reminder of the bounds beyond which the king was not permitted to go. The king was then only the first lord among equals. These great lords paid little attention to any notion of mystical sovereignty in the king. They respected only real power, and they constantly intrigued among themselves to make new combinations of power. Shakespeare's plays remind us how often the crown changed heads by violence in the Middle Ages. So long as the king depended on armies organized, led, and paid by his nobles, he could not claim to order them about as he pleased. He negotiated combinations of nobles to keep him on the throne, and he offended his supporters at his peril.

During all the centuries of the Middle Ages the lords were also bound by the custom of the country, and if a lord owned two estates with differing local customs his courts in the two places dispensed justice according to the varied customs prevailing in each.

The power of custom was not suddenly overthrown. Very gradually through the centuries the kings acquired an acknowledged right to send their own judges through the country, and these judges gradually expanded their rights to try cases of more and more kinds. Gradually also, they abandoned the old way of "discovering" and enforcing local customs. Instead, they began to enforce the king's commands expressed in general terms, and these commands became the new laws. Scholars call them "statute" laws to distinguish them from the so-called "common" law. One must not read too much into that name "common" law. It was not the common custom of the people. It was simply common among the judges. They read each other's decisions and tried to keep new decisions consistent with old precedents. Without requiring express commands from the king, the judges made their own body of law just as effective as statute law. These judges knew their business. They were the king's appointees, and their function was to organize his kingdom to be controlled from the center, the royal court. Naturally such a revolutionary change did not come swiftly or easily nor without the establishment of a large machinery of enforcement and a lot of official violence against resisters. What the whole process amounted to was a long, long, war waged by the kings against their own people until final conquest converted the people from being the king's followers to being his subjects.

Thus was the nation-state created. I have oversimplified, of course. There were times when many of the people were glad to see the king's power increase in order to overcome the power of the great nobles whose private wars against each other, and extortionate exactions from their vassals, created constant misery. But the essence of the creation of the nation-state, good or bad, was the overthrow of local power and custom by centralized

power and law. In short it was the process of creating national sovereignty. This process came to a grand historical climax in the reigns of the Tudor and Stuart monarchs in the sixteenth and seventeenth centuries. It is then that we stop speaking of the Middle Ages in England and begin to say "modern history," and it is from that era that the legal conceptions of the United States derive.

My point in reciting all these ancient goings-on is to clarify that sovereignty not only is not an absolute now, but it never has been. Its shape and power grew and declined, expanded or diminished, according to historical circumstances. When the Stuart kings James I and Charles I claimed to be sovereigns by divine right, the English people split into violent civil war, and the winners cut off King Charles's head to demonstrate conclusively that God was not on his side. When the monarchy was restored, it shared power with Parliament. The power of the national state continued to grow as against the rights and customs of local communities, but the control of the national state was divided. The so-called sovereign was stripped of the full power of sovereignty, retaining only the show of it.

Sovereignty in the United States has also been reshaped by history. To understand it we must note that sovereignty is a two-faced thing. It turns one face to powers outside the nation and forbids them to cross the national boundary. The other face is turned toward the land and people within the nation to command their obedience. Examining these two faces separately, we shall make some interesting discoveries.

Let us look first at sovereignty facing outward. When England first planted colonies on this continent, they held charters granted by the crown. Each charter spelled out what sort of government the colony should have and what rights each colonist should enjoy. The charter was what we

would call a constitution nowadays, except that it was given by the crown instead of the people, and it could be taken away by the crown after due legal process. Obviously the colonies were not sovereign when they faced toward England.

But they assumed an attitude of sovereignty when they faced toward the Indian tribes in their neighborhood. They declared war on those tribes and negotiated treaties of peace and trade with them. In these treaties the colonies stipulated boundary lines between themselves and the tribes even though their charters provided boundary lines that included the tribal territories. When the parent country, England, negotiated with France, England claimed sovereignty over all the lands bounded by the charters, including the territory of the tribes; but when New York, for example, treated with the Iroquois Five Nations, New York accepted a carefully drawn line between its own jurisdiction and that of the Iroquois. Here is a muddle in theory and a scandal in law.

It did not bother the colonists. They simply faced up to facts of power, pushed for as much as they could get, and waited for another opportunity to get more. As soon as we grasp what they were doing in actual practice the muddle clears up. Both the crown and the colonists were pretending to have sovereignty and intending to acquire it, but they all understood where real power lay, and they bided their time.

I have not been psychoanalysing them. The ruling gentlemen of colonial times expressed themselves clearly in private correspondence, no matter how purposely fuzzy they might make public utterances. In 1715, for example, New York's Colonel Heathcote wrote a letter to a minister in the London government recommending that the government should take steps to "keep the Indians quiet and in temper, till we have our country better settled and

secured and the French rooted out, and then we may expect to have the heathen on better terms." (New York Colonial Documents 5:433)

An extremely clear statement was made in 1765 in a letter from Superintendent of Indian Affairs Sir William Johnson to Attorney General John Tabor Kempe of New York. How could the king's dominions include Indian tribes, Johnson asked, "to whom the Laws have never Extended without which Dominion cannot be said to be Exercised?"

He continued: "Strictly speaking, our rights of Soil Extend no farther than they are actually purchased by Consent of the Natives, 'tho' in a political Sense our Claims are much more Extensive, and in several Colonies include Lands we never saw, and over which we could not Exercise full Dominion with 10,000 of the best troops in Europe, but these Claims are kept up by European powers to prevent the Encroachments or pretensions of each other, nor can it be consistent with the Justice of our Constitution to extend it farther in this Case." (Sir William Johnson Papers 11:925)

In the same year of 1765, Johnson explained in another letter how he applied his theoretical knowledge in practice: "I have laid it down as an invariable rule, from which I never did, nor ever shall deviate, that wherever a Title is set up by any Tribe of Indians of little consequence or importance to his Majestys interest, and who may be considered as long domesticated, that such Claim unless apparently clear, had better remain unsupported than that several old Titles of his Majestys Subjects should thereby become disturbed: -- and on the contrary, Wherever I found a Just complaint made by a People either by themselves or Connections capable of resenting and who I knew would resent a neglect, I judged it my Duty to support the same, altho it should disturb the property of any Man whatsoever."

In 1772, Britain's Commander-in-Chief in America, General Thomas Gage, was equally clear: "It is asserted as a general Principle that the Six Nations having conquered such and such Nations, their Territorys belong to them, and the Six Nations being the Kings Subjects which by treaty they have acknowledged themselves to be, those Lands belong to the King. I believe it is for our Interest to lay down such principles especially when we were squabbling with the French about Territory, and they played us off in the same stile of their Indian Subjects, and the right of those Indians. . . . As for the Six Nations having acknowledged themselves Subjects of the English, that I conclude must be a very gross Mistake . . I know I would not venture to treat them as Subjects, unless there was a Resolution to make War upon them, which is not very likely to happen, but I believe they would on such an attempt, very soon resolve to cut our Throats." (Sir William Johnson Papers 12:994-995)

These gentlemen looked at sovereignty in a very practical way. They recognized it as a legal fiction, an abstraction invented to serve the purposes of lawyers, and they used it in just that way. Abstractions are constructions of the mind and can be handled in any way that intelligence chooses to deal with them. For the statesmen in the colonies, then, sovereignty was a highly fragmented thing. The king claimed it all, and his subjects obediently repeated his claims. But the king could not enforce his sovereignty over the Indians, and for the most part he did not try to. His agents used a species of double talk when they negotiated with Indians, and so did he. Facing toward France they claimed the Indians as subjects. Facing toward the Indians they acknowledged and dealt with separate Indian governments and recognized their territorial rights.

These carefully vague arrangements changed after the Seven Years War. By the Treaty of Paris that ended the war in 1763, France ceded Canada to Great Britain. When the Indians heard about it, they were outraged. By what right, they demanded to know, did France give away land that belonged to Indians? They rose in arms, in Pontiac's War, to drive British soldiers out of their territories. Though they were defeated, the crown tried to forestall future uprisings by making a concession. It issued the Royal Proclamation of 1763 forbidding colonial settlement west of a line to be surveyed along the Appalachian Mountains. It was a simple act, but its implications were very complex indeed because the line nullified boundary provisions specified in the sea-to-sea charters of a number of colonies, among them the biggest of all, Virginia.

The colonists' first response was to try somehow to wriggle around the line or leap beyond it. In order to survey the line, treaties with the tribes were necessary, and these negotiations were conducted so as to accommodate certain investors by pushing great salients out from the mountains. Other speculating gentlemen traveled to London to lobby for grants of whole new colonies in Indian territory. They came very close to success, but their schemes were finally shattered by a combined decision of king and Parliament to suppress rebellious behavior in the colonies.

Troops that had been stationed in Indian territory to keep the Old natives quiet were moved to the coastal cities to pacify the New colonial natives. Parliament responded to colonial assertions of autonomy with an act in 1766 declaring that "the said colonies and plantations in America have been, are, and of right ought to be, subordinate unto, and dependent upon the imperial crown and parliament of Great Britain." To dispel any shadow of doubt, Parliament added that the king in Parliament "had, hath,

and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the crown of Great Britain, in all cases whatsoever."

That declaration was met head-on by Thomas Jefferson in 1774 with the equally plain statement that "the British parliament has no right to exercise authority over us." Looking westward toward the constricting Proclamation Line, Jefferson defied the king's sovereignty as well as Parliament's. The principle that all lands belonged originally to the king, he called "fictitious," and asserted that the king had "no right to grant lands of himself. . . all the lands within the limits which any particular society has circumscribed around itself are assumed by that society, and subject to their allotment only." He added meaningfully that Virginia had "as yet fixed no boundary to the westward."

There was no way of reconciling Parliament's principles with Jefferson's. The Revolution came, the issue was fought out, and Jefferson's side won. What happened then illuminates the difference between the Revolution's grand general principles and its application of them in practice.

Let us revert to Jefferson's principle regarding authority over land -- "all the lands within the limits which any particular society has circumscribed around itself are assumed by that society, and subject to their allotment only." Any Indian tribe would be content to accept that principle; it is a tightly concise statement of what Indians mean by sovereignty over land. Jefferson faced a contradiction in his own theories. If Virginia could claim boundaries at the Pacific Ocean, as for a while the state did, then what was the point of the Indian tribes within that vast territory drawing boundaries around themselves? He solved the logical problem by keeping theory rigorously independent of practice, as we

shall see, very much as he could write "all men are created equal" while holding some two hundred slaves on his plantation. Jefferson was an excellent lawyer.

The Revolutionaries frequently had difficulty with their arguments about sovereignty, but they rarely forgot that the function of their logic was to justify what they wanted to do. Their difficulty arose from two desires that seemed impossible to rationalize with the same argument. To gain freedom from rule by Great Britain, the colonial Revolutionaries argued the right of a given people to make a social contract for its own government. Yet the same Revolutionaries wanted to extend an empire of their own over Indian tribes and territories. To avoid glaring contradiction the Revolutionaries simply assumed that Indians were not really human and tribes were not really societies. George Washington growled that Indians had "nothing human except the shape." All agreed that tribes were incapable by their nature of aspiring to sovereignty.

Then came a crunch. Though no tribe could be sovereign, all of the colonies claimed to be. Which of them would get the empire? Without worrying too much about theory the newly independent states avoided war amongst themselves by agreeing to share sovereignty -- to divide it up into itemized parcels, all states to participate in a central government with specified powers, and each state separately to keep all powers not specifically forbidden to it. The empire would be a cooperative affair. The states agreed to give up their conflicting claims to western lands in order to create a shared National Domain between the Appalachians and the Mississippi. With a true burst of inspiration, they agreed not only to share that empire among themselves, but to create new states in it, with rights and shares equal to their own. Thus they solved the problem of potential new

revolutions against themselves similar to their own secession from the British Empire.

There was no serious opposition to this scheme after the states agreed to give up their individual western claims. It was adopted almost casually in a series of Northwest Ordinances between 1784 and 1787. What needs to be stressed now is that agreement was twofold: (1) explicitly the Revolutionary states were ready to share sovereignty with emigrants from their own ranks and with total strangers migrating to the new territories from Europe; (2) implicitly they excluded totally from any share in sovereignty the Native peoples already living in the so-called National Domain. The exclusion was not an oversight. When the Delaware Tribe negotiated a treaty in 1778 for the establishment of an Indian state headed by the Delawares, to be accepted as one of the United States, Congress ignored the treaty so it failed for lack of ratification. Similar proposals were to be made in the nineteenth century by other tribes. All were passed over or rejected.

The first impulse of the victorious Revolutionaries was to adopt the theory that the tribes were devoid of any semblance of sovereignty. At Fort Stanwix, in 1784, when United States commissioners treated with the Iroquois, the commissioners stated bluntly that the Iroquois and all their allies were conquered peoples because Great Britain's defeat was the defeat also of Britain's Indian allies. Since Britain had given up sovereignty over all the land east of the Mississippi, the commissioners held that the Indians had no land left. By the gracious charity of the United States, the Iroquois would be permitted to live in scattered reservations. The commissioners had troops present to second their motion, and the Iroquois signed under protest.

But when the western Indians learned of the theory that they had been conquered, they denied it with a compellingly cogent style of argument. They took up arms again and thoroughly trounced two armies sent against them. The United States government faced the same problem that Great Britain had faced after Pontiac's War. In the long run its power was great enough to smash Indian resistance, but the process would be more costly than it was worth. So the Americans abandoned their conquest theories and resumed the policies of the British crown, simply substituting themselves in the place of the crown. The decisive moment came with the Battle of Fallen Timbers in 1794 when General Anthony Wayne defeated the allied tribes of the west. They sued for peace, and War Secretary Timothy Pickering seized the opportunity.

He instructed General Wayne to make "such a peace as shall let the Indians go away with their minds at ease" because "Otherwise it may be but the era of renewed hostility." To accomplish the desired end it was necessary to put aside theories of conquest and overt declarations of sovereignty. Pickering was blunt: "The unfortunate construction put by the first Commissioners on our treaty of peace with Great Britain . . .a construction as unfounded in itself as it was unintelligible and mysterious to the Indians . . . cannot be too explicitly renounced." He came directly to the heart of the matter: "the land is theirs (and this we acknowledge)."

Wayne followed his instructions. In the Treaty of Greenville of 1795 he did demand cession by the Indians of certain specified lands, but he relinquished claims by the United States "to all other Indian lands, northward of the river Ohio . . ."

This would seem to have settled the issue, but as always there was some ambiguity involved. A restriction was imposed upon the Indians'

rights. They agreed never to cede any part of their land to any other government than the United States, in return for which the United States pledged to protect them against "all other white persons who intrude upon the same." Interpreted, this meant that the United States had not relinquished its claim to ultimate sovereignty, and it continued to assert that claim in its dealings with European powers. The further meaning of ultimate sovereignty was that the United States intended to move its boundary with Indian territory westward whenever it could mount enough power on the spot to force Indian retreat. We know that this is what happened.

Here, once more, we may notice Thomas Jefferson's role. He was the guiding spirit in the enactment of the Northwest Ordinance. Yet, eight years later he was to write a formal opinion that the Indians in the Northwest Territory "had the full, undivided and independent sovereignty as long as they choose to keep it and that this might be forever." His theory just possibly may have been expressed so emphatically because there was still a British presence lurking in the Northwest Territory, and recognition of Indian sovereignty could be a way of preventing British maneuvers. That must be speculation, but it is evident that the practical enactment of the Northwest Ordinance in 1787 conflicted with the theoretical recognition of Indian sovereignty in 1795. This was not a serious problem. The way to reconcile the contradictions of theory and practice was simplicity itself, and Jefferson did not have to spell it out. The trick was to make the Indians so uncomfortable that they would <u>want</u> to depart. In theory they "might" keep their land forever; in practice they would sell out and go away.

There was another twist to the sovereignty problem at about that same time. Though the individual states had formally relinquished claims to

jurisdiction in the west, some of them clashed with the federal government by continuing to deal with Indians living inside their own borders. Congress therefore enacted a series of Nonintercourse Acts that preempted all rights of jurisdiction over Indian affairs wherever the Indians might be. Only the tiny few who had become citizens of states were excepted. These Nonintercourse Acts are the basis for the claims cases of Eastern Indians nowadays.

Now here was a curiosity. Almost the only people exclusively under Congress's direct jurisdiction were Indians, yet none of these Indians was either a subject or a citizen of the United States. Legally speaking the National Domain was void of persons. The Indians were legal aliens in what Congress conceded were their own lands. As Dickens's Mr. Bumble observed, "If the law supposes that . . . the law is a ass, a idiot." But the law is like all the rest of the breed of asses in knowing where it wants to go and being very stubborn about getting there. The objective of the men making federal law was to acquire true centralized national power for the federal government, to which end they seized every available handle and the Indians were available. A peculiar lot, certainly, who never fitted precisely into any prearranged pigeonhole in the law, but they were there.

It was John Marshall, the famous nationalist Chief Justice of the Supreme Court, who decided to whittle out a special slot for Indians in the law. Typically he did this in order to assert that federal power overrode claims of state power. Not too untypically he had to falsify Indian cultures and characters to make this point. And, completely typically, the only people to take a real beating in this quarrel about state versus federal sovereignty were the Indians who provided the occasion for it.

I am referring to what came to be called "the Trail of Tears," the expulsion of Cherokees from their homeland in the east. The story is familiar and need not be gone into in detail.

In 1823 the Supreme Court heard the case called Johnson and Graham's Lessee v. McIntosh in which Chief Justice John Marshall plainly and overtly denied Indian sovereignty over any part of the continent that the United States chose to claim. Marshall reached out to the myth of savagery for an excuse to justify seizure. "The tribes of Indians inhabiting this country were fierce savages," he wrote, "whose occupation was war, and whose subsistence was drawn chiefly from the forest." A variety of things were wrong with that statement. It was in the past tense, and the case before Marshall concerned unconquered Indians of his own time. Even at the beginning of English colonization, the Indians of the east coast drew their subsistence mostly from tilling the land and fishing rather than "from the forest." And they engaged in war much less frequently and destructively in aboriginal times than they came to do after Europeans invaded. For that matter, Europe's wars were vastly more horrible and at least as perpetual as those of the Indians.

None of Marshall's errors (which, I think, were made knowingly and deliberately) deterred him from concluding that the mere fact that Europeans found America entitled them to claim sovereignty by right -- if they could hang onto it. He remarked, "However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land and cannot be questioned." In short, the principles distinguishing

morally justified war from naked aggression did not restrain Europeans from invading Indian land. Marshall was blunt: "That law which regulates, and ought to regulate in general, the relations between the conqueror and the conquered was incapable of application" to people defined as savages. Reduced to less legalistic terminology, Marshall declared that might is right.

With such encouragement the state of Georgia put pressure on the Cherokee tribe to dispossess it of its lands and to force its people to remove. The tribe went to court to defend itself, and Marshall ruled against it, laying down another dictum. This time he declared that the Cherokees could not be regarded on the same plane as foreign nations, no matter how they organized their government -- which was that of a republic with a constitution -- because they were merely a "domestic dependent nation."

There were strong dissents from Marshall's opinion, and he himself tried to take some of the sting out of it in a later case, but the damage had been done. The Cherokees were dispossessed and forced into a cruel emigration. What is especially to the point of our present purpose, Marshall's opinion has been used as the basic judicial standard ever since for determining the rights and statuses of Indian tribes, and it has governed the hearings of the modern United States Indian Claims Commission.

I shall not attempt to trace later history. There have been zigs and zags in official policy, and there is less resort nowadays to the mythology of savagery, but John Marshall's dicta have controlled the assumption of sovereignty despite modern knowledge that their evidentiary basis is fallacious. I wish to remark, however, that one aspect of savagery mythology is still unfortunately alive and healthy: the notion that Indian

tribes had no government "worthy the name." This has become transmuted in modern anthropological theory into a distinction between social organization and political organization. The proponents of the theory argue that tribes were organized socially, but that they could not be considered to be political until they acquired some of the characteristics of the state form of government. It seems to me that this is merely to clothe old error. The invading Europeans of the seventeenth century said the same thing when they justified seizure of Indian lands and persons on the grounds that the Indians lacked "civil" government. The obvious facts are that the tribes have held together against centuries of attack and pressure, that they have conducted organized war and negotiated treaties of peace and alliance, that they have built and rebuilt communities in spite of terrible conditions of adversity, and that they have maintained traditions of distinct cultures against overwhelming pressure to assimilate to the dominant surrounding culture. To refuse to recognize political forces in these phenomena is to revert to scholastic quibbles about angels dancing on pins.

The tribes did and do have political governments. But it is equally obvious that these governments have been incapable in the past of mobilizing force sufficient to prevent the assumption of dominance by Europeans and Euramericans. The question now is whether the tribes can summon enough unity to create a power of public opinion sufficient to win their demands for greater autonomy. I do not venture to predict what they can accomplish in court because lawyers and judges can stand on their heads with the greatest of ease when it suits their purposes. Like Humpty Dumpty in Alice in Wonderland, when they say "sovereignty" it means just what they choose it to mean -- neither more nor less. Scholars also have demonstrated a certain facility in forcing facts to fit jargon. Ultimately, however, real power forces recognition of the actuality supporting it.

The legal fiction of sovereignty can be dealt with in a variety of ways. It can be divided in theory in any number of ways, and it has been. It can be preserved in theory and ignored in practice, and it has been. What will be done finally depends not on theory but on resources, determination, intelligence, and perseverance. To rephrase an old saying, theory helps those who help themselves.

Discussion

Dr. Virgil Vogel: I was a little surprised that you dealt with Cherokee Nation vs. Georgia but not with Worcester vs. Georgia a year later. In the first cases that you discussed, the court side-stepped the issues merely by declaring that the Cherokee did not have the status to sue in the courts since they were not a foreign nation or a domestic within a nation. But it seems to me a year later the court in a way reversed itself merely because Worcester was an American citizen and had the right to sue. In this case we have, I think, a strong affirmation of Indian sovereignty, which has never been upset and which can be and is relied upon by Indians today in the affirmation of sovereignty. In this case the court held that the extent to which Indians have surrendered sovereignty to the Federal government only had reference to the foreign nations exerting jurisdiction as opposed to the United States. But it did not mean that these Indian nations or tribes were subject to the jurisdiction of the states within which geographical limits they found themselves. They exercised a political position above the states and with the Federal government. And I think that was an affirmation of sovereignty. I think it has been so regarded ever since, including arguments in Felix Cohen's book on Federal Indian Law.

Jennings:

Well, one can recite a long series of cases, and I dare say that will occur. I wanted to get to the point of domestic dependent nations, which I think (in fact I've seen it in decisions of the Indian Claims Commission), is the basis on which they ruled. I said so explicitly.

Wilcomb Washburn, Smithsonian Institution:

I just want to compliment Fritz on a very interesting presentation. But I think that throughout there is a certain confusion that may arise in the minds of the listeners. Essentially it is the confusion between legal fiction and practical reality. You've made an excellent point, but I still think a lot of people don't understand that the legal realm is quite distinct from the realm of reality--legal recognition of China, for example. Legal closing of the street doesn't imply that in fact it's closed, of course. And in the same way, legally treating the slave as a non-person doesn't imply that he's not human. When you say the colonists (and Washington in particular) did not really regard the Indians as human or the tribes as real societies, I think you overstate the case and erode that distinction between the legal theory and reality, which was well understood in the minds of those using it. The other confusion is the idea that sovereignty implies justice as well as power. Essentially sovereignty is an expression of power, as you pointed out, and power is constantly seized and shared and lost and gained, and so on. But there's always the implication in your remarks that it should somehow express justice as well, which again flies in the face of "reality." Sovereignty perhaps should express justice, but in a sense it is not really relevant to the real world; and I don't think you made quite clear that distinction. And finally, perhaps to support Mr. Vogel and his point that, bad as the situation is, one should look at it from a comparative point of view--the extent to which Indian sovereignty was upheld in whatever partial or limited way is nonetheless upholding a certain degree of sovereignty, particularly so in comparison with other nations or other traditions: Spanish, Portuguese, French, and the rest of the world in general. You

really should judge not against the ideal standard but against the comparitive standard of what other invaders of aboriginal peoples' lands did; what recognition of the sovereignty of other aboriginal people was granted by other powers? One should compare that recognition with the English recognition. If you use that as a test rather than the ideal standards, as Vogel suggests, it is not quite as dark a picture as perhaps you suggest.

Jennings:

Well Wid, I'm going to surprise you by agreeing with you. I don't see anything wrong in what you've said. If there are failings in my presentation, then I would recognize that I had to end up at a certain point in the morning and make some room for other people. I said what I wanted to say as a beginning, and I dare say the corrections would be made by others.

Dr. William Fenton:

I have a couple of comments before someone else starts. I was very much interested in your discussion of relationships between social sanctions in early Britain and the development of custom accompanying law. You may or may not be aware that the late Radcliffe-Brown, a social anthropologist, was very sensitive in these matters. He wrote very stimulating articles for the Encyclopedia of Social Science in the 1940's, one called "Sanctions, Social" and the other one called "Law, Permanence." In these he developed this whole theory of assigning sanctions or destroying man's sanctions and their relationships to the development of law. This bothers me a bit in light of your comments on anthropological theory and political anthropology, which somehow or other segregate the onset of organized governments from social structure. Beginning with Hoebel, who is certainly one of the

leading American pioneers in political anthropology, anthropologists have recognized the counter-dependency of Indian government and Indian sovereignty, by way of implication. On the earlier activity of both social sanction and social structure,I for one am completely unfamiliar with any body of organized anthropological literature that makes any real claim that Indian governments weren't governments and they weren't different from any other tribal governments; they have the same kind of groups as you described in the English system.

One other point which I think may be germane: I recently read the correspondence between Washington, Jefferson and Monroe about the time of the Fort Stanwix Treaty (1784) and at the onset of the pioneer organization which had come under The Articles of Confederation. Monroe had attended the Treaty of Fort Stanwix with Lafayette, and writing to Madison he said that it was really very embarrassing to have been from New York to undertake a treaty with the Indians. However, jurisdiction over Indian affairs was unresolved during the Confederation Period. The general government was powerless to do anything about it, particularly. If Governor Clinton could in any way demonstrate that the Indians from New York pertained in any way to the State of New York, either as associated citizens or noncitizens, the general government was powerless to interfere with New York's treaty negotiations. And although theoretically he agreed that this should not have happened, it did happen. What interested me was the kind of mixed jurisdiction in the law, which maybe Mr. Lazarus will comment on, and which I encountered when I joined the Federal Indian Services Office in the 1930's and operated between the State of New York and the Federal Government. It was right there from the beginning and was never really clarified, because the general government in Philadelphia was powerless to alienate land without a declaratory treaty.

Jennings:

To take your last point first, Bill, I'm aware of that difficulty with a general government laying claims to powers that it couldn't enforce. And it was true not only in New York but in Massachusetts as well, which is the reason why the Mashpees got into their situation then and nowadays. Again it arises from the difference between theoretical claims of due power and the actual possession of it and the way these things are worked out in practice. As for your rejection of my remarks about anthropologists, I rather expected to have somebody heave a brick on that one. This is my interpretation of the way that distinctions are made. I know about Hoebel and I think his work is great but this is my interpretation of the way so many ethnologists nowadays go into a very involved kind of logic distinguishing bands from tribes. Officially bands don't really rate as tribes. The way tribes are defined as being political entities implies that there is no real political government in bands. I may have misunderstood what they were saying, but that's the way it comes through to me.

Fenton:

I just wanted to know your opinion on it.

Jennings:

It wasn't wholly unjustified; it wasn't just a swing.

Dr. Henry Fritz, St. Olaf College:

I have one question concerning material dealing with the period just before the treaty talks. I'm just not sure you made in my view a proper distinc-

tion between rights of the soil and sovereign jurisdiction. Those of course are the matters of your dissertation. ("Miquon's Passing: Indian-European Relations in Colonial Pennsylvania, 1674 to 1755." University of Pennsylvania, 1965).

Jennings:

Well, I know the distinction you're talking about. Right to the soil is distinct from sovereign political right over persons. But in the language that followed-through, with Jefferson particularly saying explicitly what sovereignty is, it seems to make this interpretation justifiable to me.

Charlotte Heth:

Are there any other questions or comments?

Jennings:

Well, I haven't succeeded as well as I attempted. I thought I could get many more fights than that.

Arthur Lazarus Jr: Counsel for the Association on American Indian Affairs. Give me a chance!

Charlotte Heth:

I would like to introduce our next speaker who is Arthur Lazarus Jr. He is going to be speaking about Tribal Sovereignty under United States Law, and is officially the Counsel for the Association of American Indian Affairs. I've forgotten the name of his firm.

Lazarus:

Fried, Frank, Harris, Shriver, and Kampelman. That's why you forgot!

Heth:

Anyway, his paper is a legal discussion of rights of tribes and the federal government's right to limit tribal sovereignty--legal theory in short. So, I would like to introduce Mr. Lazarus.

Lazarus:

Thank you. I'll stand up and see how good my glasses are. If they're not completely effective, I think I'll sit down.

My paper is on Tribal Sovereignty under the United States Law. I think (at least I hope) it's a practical look at what the law is: the actuality of the law (if there is an actuality of the law.) And I would not draw the distinction between law and the real world thats been discussed before. For lawyers, and I think for Indians, law is the real world, because everything that Indians can do in our society is surrounded by law. And the most effective Indians and tribal governments are those which know the limits of the law.

In talking about tribal sovereignty under United States law, we first have to define the term "tribe". I don't want to appear to be debating how many angels dance on the head of a pin; but to understand how the courts have treated tribal sovereignty we must have a definition of tribe. And there have been many past uses of the term. One definition is an Indian entity which has treaty relations with the United States. Another is an Indian entity which is denominated a tribe in a statute or executive order. Another is an Indian organization which exercises political authority over its members. Yet a fourth is a group of Indians treated as having collective rights in land and property, including funds. Yet another is a group of Indians possessing a common ethnohistoric identity. And then a court of appeals in a decision which recently was reversed by the Supreme Court came up with yet another definition of Indian tribe: a voluntary association of private citizens with Indian ancestry. That was an effort to destroy the effectiveness of the tribe, and fortunately it was reversed by the Supreme Court.

For purposes of my discussion, I would define a tribe as an entity composed of Indians, which exercises political jurisdiction within a defined territory and which is recognized as a tribe by the United States. Now I don't wish to denigrate the importance of the common ethnohistoric identity or cultural identity, because that's how Indians view tribes. But it is possible to have a tribe in the law which does not have a common ethnohistoric identity, such as the entity that was called the Kiowa-Comanche-Apache Tribe of Oklahoma, which then split apart because it did not have a common cultural identity. And there are groups of Indians that do have a common ethnohistoric and cultural identity which are not recognized as tribes.

But if we're talking about tribal sovereignty, it is only a tribe recognized as a tribe that is given the attributes of sovereignty by the courts. And so even that makes our definition a reactive one: you're a tribe if Uncle Sam recognizes you as a tribe. I think for purposes of legal analysis exactly that must be one part of the definition we're going to have to use.

The next question is, what is sovereignty? And as Dr. Jennings has pointed out, there is a dictionary definition of sovereignty. This says it's the "supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; the fundamental and unlimited attributes of a free nation." I'd like to remark parenthetically I don't think there is a moral quality to sovereignty. Sovereignty is power, which may be exercised for good or evil, and therefore we should not attempt to give it moral qualifications-at least in our definition. But, for Indian tribes in any event, the term sovereignty must be qualified, because Indian tribes in our law do not exercise the full attributes of sovereignty. They are indeed classed in the law as dependent nations or governments which exercise quasi-sovereign powers. That means that an Indian tribe under the United States law does not have the attributes of sovereignty, as, let us say, the Republic of Mexico does, because its powers are not unlimited and independent. And yet at the same time you cannot draw an analogy between an Indian tribe and a municipal corporation such as the City of Chicago, because the municipal corporation is completely the creation of the state and exercises limited powers, whereas Indian tribes in the law, although their powers are limited, are derived from their original sovereignty; they are not powers created by the United States. The theory of tribal sovereignty under United States law has been expressed probably best by Felix Cohen. Certainly he was the

first who synthesized thinking about American Indian Law. His formulation, which appears in the Handbook of Federal Indian Law and has been adopted in many legal cases, is that an Indian tribe possesses in the first instance all of the powers of any sovereign state. As authority for that proposition he cites Worcester vs. Georgia, which almost every case on Indian law starts with. In Worcester against Georgia, John Marshall gave a classic formulation of the law, stating--and again I quote--"the Indian nations had always been considered as distinct independent political communities." So that is the first proposition in the formulation of tribal sovereignty; that a tribe starts with full sovereignty.

Then however, the second stage of the formulation is that conquest--and we can use the term conquest loosely; it can be discovery or the landing of representatives of the western European world--but however we characterize it, and it was conquest in the first formulation, conquest renders the tribe subject to the legislative power of England (and subsequently of course to the United States). And when that legislative power of the United States attaches the tribe's power of external relations, the external powers of sovereignty, (such as the power to enter into treaties with foreign nations) terminate just as a matter of law, upon the acquisition of sovereignty by the United States. The external power of a tribe to exercise sovereignty ceases. The second thing that ceases with conquest is the tribes' power to dispose of land except to the United States or with its consent. (That's the Iroquois Indian case that Dr. Jennings referred to). Those were, in the Cohen formulation, the two attributes of sovereignty that went immediately upon the coming of the European power. But otherwise, in every other respect, the internal sovereignty of the tribe, its power

over domestic affairs, remained unchanged. Now those domestic powers are subject to qualification, limitation or even elimination by treaty or by act of Congress. But, except as so modified, the full power of internal sovereignty remains vested in the tribe. There are of course a great number of examples where that domestic or internal sovereignty has been limited. One of the most famous is the Seven Major Crimes Act which took the criminal jurisdiction away from tribes on major crimes. A potentially very great invasion of the tribes' power of self-government was the Indian Civil Rights Act of '64. That has subsequently been very much modified by a Supreme Court decision that I'll get to in a minute; but, at any rate, it did at the time of passage have a substantial impact on the domestic sovereignty of Indian tribes.

The whole theory of Indian tribal sovereignty recently came under new attack. A young man named Martone wrote a law review article in which he took the position basically that sovereignty was a myth, at least tribal sovereignty was a myth. That article would have sunk like the lead balloon it was were it not for the fact that it was picked up by Congressman Lloyd Meads and made the basis for his Minority Report on the Indian Policy Review Commission, which gave it at least some color of respectability. Fortunately the Supreme Court came down with a decision in the Wheeler Case shortly thereafter which strongly upheld the criminal jurisdiction powers--this is over minor crimes--of Indian tribes, distinguishing those powers from those of the United States. In other words, a tribe is not exercising a federal criminal jurisdiction but is exercising a separate and independent tribal criminal jurisdiction. I think Wheeler has, at least for the foreseeable future, put an end to the theory that tribal sovereignty never existed. I think that is gone. However, tribal sovereignty is not

without even additional qualifications because the Supreme Court, just about the time it was deciding the Wheeler Case, upheld in a double jeopardy situation the existence of a separate and independent tribal criminal jurisdiction.

At just about the same time it also held that tribes do not have any criminal jurisdiction over non-Indians within the reservation. And there was an interesting exercise in Supreme Court logic to reach that result. The court could not find any federal statutes specifically taking away the tribes' criminal jurisdiction over non-Indians. So it went back to day one. If you recall, I said that according to the Cohen formulation and the John Marshall formulation, when the European powers came, the tribes lost foreign sovereignty and lost power to deal with their land. Now according to the Supreme Court, they also lost criminal jurisdiction over non-Indians just at the same time. That's a new wrinkle on the old theory and it shows how inventive the Supreme Court can be.

Now what is sovereignty? What does it do for you? What does it mean? Well, there are certain inherent attributes of sovereignty which tribes possess. At the first, sovereignty means immunity from suit. The United States enjoys sovereign immunity, the State of Illinois enjoys sovereign immunity, and so do Indian tribes. And that was very strongly reaffirmed by the Supreme Court in the Martinez Case. That is the case which in effect held the Indians Civil Rights Act unenforceable because, although you had a statute granting you rights, you did not have a grant of jurisdiction in the courts to sue the tribe if it violated your rights. So

that is a strong reaffirmation of tribal sovereignty by the Supreme Court. I can foresee the day when even this principle of sovereign immunity from suit will be chipped away, not because anybody is particularly anxious to attack tribes because they are sovereign, but just because the whole theory of sovereign immunity for all jurisdictions in the United States is falling into disrepute. The theory of sovereign immunity is that the sovereign can do no wrong. We are learning that the sovereign can do wrong and therefore we are learning that it is necessary at times to sue the sovereign. The United States has waived its immunity in almost all cases. Most states have waived their immunity. I think the time will come when tribes, if they wish to engage in economic development, will have to consider that they too will be required to waive sovereign immunity because you cannot have a contract where one side can be sued and the other side cannot. If the tribes do not waive it voluntarily, I can foresee--I'm not saying it's going to happen tomorrow--but I can foresee a court saying that where a tribe acts in its governmental capacity it still enjoys sovereign immunity; but when it acts in its proprietary capacity as a landowner developing resources, that in that capacity it can be sued. Such a case hasn't come up yet; I just think that one may.

There are other governmental immunities which sovereigns enjoy and which tribes enjoy. A tribe is not subject to adverse possession. Some one can come squat on tribal land for twenty or fifty or a hundred years; he cannot get title to that land by virtue of adverse possession, although that would be possible if somebody squatted on your land. Tribes are not, unless specifically stated so, subject to latches, which is a legal theory of delay (you lose your rights if you delay in exercising them), or to

statutes of limitation. Tribes have certain governmental corporate powers: in other words, a tribe can sue in its own name. It's not so long ago that that right was upheld in the courts. Previously, in the days when unions could not sue in their own name, there was a very great question as to whether Indian tribes could sue in their own name. Tribes have the right to enter into contracts and they have their God-given right to spend money. And that's a right without regard to the trust relationship. Tribes have the power of eminent domain--a power which, as far as I am aware, they have never exercised. This is an interesting one because in 1936 when the Indian Reorganization Act was passed, it contained in it a "Section 16" which permitted tribes to organize under federal law. The phrase in the statute was, "in addition to their powers under existing law, tribes may"--and then it spelled out a number of things that Indians tribes could do under the statute. After the law was passed, the Secretary of the Interior had the bright idea that he needed to know what powers tribes had under existing law. So there was a famous solicitor's opinion, that of Felix Cohen--that name keeps cropping up all the time--he authored it. Interestingly enough, although he listed a great number of powers for Indian tribes, the power of condemnation or eminent domain was not among them. There was a supplemental memorandum opinion issued about two years after that that was never published, but which did say that tribes have the power of eminent domain. That document remained buried for about twenty-five years when one of my clients adopted a condemnation ordinance. It was challenged in the courts, and I was doing some research and just happened to be talking to somebody in the Bureau of Indian Affairs who scratched his head and said, "I think I remember a memo on that subject." That memo was dug out and presented to the judge and now there is a federal case that says Indian tribes have the power of eminent domain.

Tribes have the power to levy and collect taxes. Now that's a sweeping statement. Theoretically, the power to tax is the power to destroy, so it's a sweeping power. Its extent has really never been tested to its fullest. Query: Whether that power to tax, which has been upheld in the courts (there are several cases that have upheld tribal powers to tax, but those taxes were directed at non-Indians doing business on the reservation), and Indians engaged in the same activity were not subject to the tax? Now that leaves open the question as to whether those taxes would survive in the face of the Indian Civil Rights Act? And there the man who would otherwise be a taxpayer can get himself into court by refusing to pay the tax, and the tribe has to come after him. Of course when the tribe sues as a plantiff then it does not have sovereign immunity as to a counter-claim, and therefore you could get the tax issue tested in the courts. And there is the general question--and these cases are now coming up and will, I suppose, be decided by the Supreme Court sometime within the next two or three years--as to whether tribes do have the power to tax, in particular the large non-Indian corporations that are engaged in resource extraction or other substantial revenue producing operations on the reservation. That is going to be an interesting set of cases to watch.

Tribes have the sovereign power to create corporations, and that is a very important power because when you create a corporation, you are creating a person. It is the act of giving birth, and only sovereigns in the sense of governments have the power to create corporations. Tribes have been recognized as possessing that power and have established many tribal corporations.

Tribes have the power to provide for the administration of justice, to establish police forces and courts, and I guess the corollary--jails. Tribes also have the power to enact laws governing the conduct of their members and the use of property. In that respect you can turn to a number of specific tribal powers, and we will see that these are governmental powers. Only governments can exercise these powers, and tribes are doing it, so therefore tribes--I guess by definition--have to be sovereign.

The first specific power a tribe has is the power to define its own form of government. The tribe has the right to choose an elective form of government or to stay with a hereditary form of government; to govern itself through a general council or a tribal council or a chief's council. That is the tribe's decision to make, and different tribes have made different choices. The Indian Civil Rights Act in its hey-day seemed to pose a threat to the continued operation of tribal governments. And actually, as the cases were developing, the further a tribe had gone from its traditional system of government, the more likely the court was to find that a particular activity was not consistent with the Indian Civil Rights Act. There were cases, for example, on one man-one vote, where in some situations the court said yes, that rule does apply to the tribe because you've adopted basically the Anglo-system of representation, and in other cases where the tribe had maintained a fairly consistent form of government which did not call for equality in voting representation--if it had traditional and historic roots--the court was much more likely to uphold it. Now it is not very likely that these cases are going to continue. Unless the Civil Rights Act is amended to authorize suits against tribes, I think we will see a complete tail-off on such litigation.

Tribes have the power to determine their own members. Here again that was attacked under the Civil Rights Act where a tribe at least claimed that it had patrilineal descent and the Court of Appeals said that this was discriminating against the women of the tribe and struck down the rule in that particular case. The court, however, went out of its way to say that this tribe (Santa-Clara Pueblo) had only recently adopted--or at least allegedly had only recently adopted--the rule of patrilineal descent. The decision might be otherwise in, let's say the Iroquois, where there had been matrilineal descent from the time the memory of man could record. But there again was an attack upon the tribe's determining its own membership, which the supreme court struck down not on the merits but because the court did not have jurisdiction.

The power of a tribe to determine its own membership is limited in the sense that where Federal Trust Land is involved or where federal funds are involved, the ultimate authority has been placed by Congress in the Secretary of the Interior. In other words, where there is a judgment in funds distribution, if the Secretary says "X" is a tribal member and the tribe says "X" is not a tribal member, the Secretary wins because the Secretary has the money and he makes the distribution.

Tribes have the power to regulate domestic relations. And of course, Indian custom marriage and divorce have been recognized by the federal courts. Tribes have the power to appoint guardians and to determine custody. Most recently, just last year, Congress passed the Indian Child-Welfare Act, which is a strong reaffirmation of the power of tribes to determine the placement and adoption and foster care treatment that shall be given for Indian children living both on and off the reservation.

Tribes of course have the power to regulate hunting and fishing within the reservation and, if the tribe has an off-reservation hunting or fishing right, the tribe can regulate that activity by its members off the reservation. This sets up the very interesting and very difficult question of tribal sovereignty: is it personal to the member of the tribe, or it is territorial? Is the tribe's jurisdiction limited to the reservation? I guess the answer is that the tribe's jurisdiction is both personal in some cases and territorial in other cases, and that you just really have to decide them on a case-by-case basis.

Tribes have the power to zone and regulate land use, certainly among their own members (or certainly with respect to tribal land). In a recent case involving Cheyenne River, there's also the power to regulate land use on allotments. The open question: does the tribe have the power to regulate land use where the land is owned by a non-Indian within the confines of the reservation? That's another very difficult issue which has not yet been resolved by the courts.

Tribes have the power to dispose of tribal property--subject to the limitation that, with respect to land, you must have the consent of the United States.

Tribes have the power to establish criminal laws; to define and establish criminal offenses. There again, within limits, because of the Seven Major Crimes Act (now up to about thirteen) in which the power of the tribe to control particular types of offenses has been taken away.

Tribes have the power to license businesses doing business on the reservation. Here again, to the extent that that power has not been pre-empted by federal law. By statute, tribes have other powers under the Indian Reorganization Act: the power to employ lawyers, a power to prevent the sale, disposition or encumbrance of tribal land, and the power, not very much recognized by the United States, to review budget estimates. The President's budget is always a deep-dark secret before it's issued, and under the Indian Reorganization Act tribes theoretically have the power to review the budgets for their reservation before they are formulated. That statutory right has never been honored.

Under Public Law 638, the Self-Determination Act, tribes now have the power by contract to take over and perform many of the functions of the Bureau of Indian Affairs under the division of Indian Health on Reservations. Now I've given you a long catalog, but I do so to show the diversity of the powers that tribes can exercise--the extent of the sovereign powers that they exercise. In essence, I hope to prove the point that is the end of the Cohen Thesis: that tribes do have all domestic powers of an independent nation save those powers that have been expressly taken away by Congress.

Now there is a second aspect of tribal sovereignty. We have discussed so far the exercise by tribes of sovereign powers. But sovereignty also operates as a shield. The sovereignty prevents others from exercising sovereign power on the reservation. And that means immunities from some federal and a substantial number of state laws. Now, insofar as the federal government is concerned, we have to start with that basic premise that the

tribe is subject to the legislative power of the United States. That power has been described by the courts in a variety of ways, most frequently as the plenary power of Congress over Indian affairs, and that includes the power unilaterally to abrogate treaties. I'd like again to make a parenthetical comment that treaty rights and sovereign rights are not the same thing. Sovereign powers are the powers inherent in a nation or government. Treaty rights are only contract rights; they are the rights that are established under the terms of the treaty and under the United States Constitution. While treaties are the supreme law of the land, so are the statutes of the United States the supreme law of the land. This is a common confusion on Indian reservations with respect to the supremacy clause. All that the Constitution talks about is that the treaties and laws of the United States are paramount over the laws of any individual state, but not that any treaty is paramount to a subsequently enacted statute.

Congress has, on a number of occasions, unilaterally abrogated treaties with Indian tribes, and the Supreme Court has held that act constitutional. It may affect a taking of the tribe's property, for which just compensation has to be paid under the Fifth Amendment. But, at least according to Supreme Court decisions--up to this point--it is a lawful act. I might say that, although Indian tribes have been the victim of most treaty violations by the United States, tribes are not the exclusive victims. I have shocked some of my students when I've come up with a case in the Court of Appeals in the District of Columbia where the United States has recently (about eight years ago) violated the United Nations Covenant by buying chrome from Rhodesia. I said "See, the rest of the world gets

the same legal theory; it just doesn't happen that often with the rest of the world." There is now at least a glimmer of hope that, if the Supreme Court were to review the subject again in the context of an Indian treaty, with a statute abrogating the treaty and, let us say, with the land (as was in past cases) being turned over not for a public purpose but for private settlers, homesteaders, and miners, there's a chance the Supreme Court might say: that is a violation of the Fifth Amendment and we're not going to permit it. That has never happened in an Indian case before, but there are intimations that it might happen in the future and I would love to have the case.

Jennings:

You better win it!

Lazarus:

Well, I've got no place to go but up.

In any event, it has never been, up to this point, a question as to whether the United States has the power to change the rules of Indian affairs. It is a question of whether Congress has had the intent to change the rules. For many years the general principles by which the courts were guided were laid down in the case of Elk against Wilkins. Elk was a native-born Indian who claimed citizenship on the basis of the statute that says any person born within the borders of the United States is a citizen. The Supreme Court rejected his claim on the principle that general statutes do not apply to Indians unless Congress expressly so says. And since it had not so said at that point in the Naturalization Statute, Elk lost his case.

Unfortunately in the Tuscarora Case, which came along in 1958, the shoe was on the other foot, and it was a power company seeking to invoke a general statute for the purpose of taking Indian land. That one went up to the Supreme Court and in a six-to-three decision the courts said in effect: concerning Elk against Wilkins, whatever the rule may have been then it is not the rule now, and general statutes do apply to Indians unless Congress exempts them. That has been the rule in an Environmental Protection Act case where the E.P.A. was held to apply to Indian land. It has been the rule with respect to the National Labor Relations Act, where union activites on a reservation were held subject to the jurisdiction of the National Labor Relations Board. So we have there a rather radical shift in the law by the Supreme Court, and now general statutes do apply. When you're trying to carve a new exception, you have to succeed in the lower courts and again recognize that this does not apply to the condemnation of treaty protected land. We'll see how it would happen with exceptions on the exceptions as the general rule.

There are other examples where tribes are excluded from the general operations of the law--fortunately the Income Tax. The Internal Revenue Service has said that Indian tribes as tribes are not taxable entities for purposes of the Income Tax. But they are so included in the operations of the Social Security Act. The tribes have also been recognized specifically in statutes as entitled to special set-asides. We see that in the revenue-sharing statutes and in the employment training acts, and housing acts too-where there are special set-asides for Indian tribes. So basically the general federal laws do now apply to Indians, but you have to carve a million exceptions out of that. All you can do is go back to the principle

that Congress can, if it wants, make the federal law apply to an Indian tribe. The question is whether it had the intent.

Now when we move over to state jurisdiction, the state always has the intent to apply its law on the reservation, and the question becomes, does it have the power? Here too, there has been a development in Supreme Court theory which is illustrated by a few quotes that I can give you. The classic statement is again back in Worcester against Georgia. There the Supreme Court said, and I quote, "The Cherokee Nation then is a distinct community, occupying its own territory with boundaries accurately described in which the laws of Georgia can have no force." Well, that stood for over a hundred years. Then in 1958 came Williams against Lee, a tax case on the Navajo Reservation. The court said "Over the years this court has modified the Worcester principle in cases where rights of the Indians would not be jeopardized." And now it is the rule that, in the absence of acts of Congress, the question has always been whether the state action infringed; in other words the state wasn't absolutely barred, and the question was whether its action infringed on the right of reservation Indians to make their own laws and to be ruled by them. Then taking the matter one step further, in 1962, came Cake against Egan. This was actually a case coming out of Alaska, which so far as the Supreme is concerned is the highwater mark of termination. The Supreme Court follows the election returns but it follows them slowly and, although termination had ended as federal policy in about 1958, the Supreme Court didn't get the word in time. In 1962 it was still announcing termination as Federal policy and deciding cases accordingly. And so the Supreme Court said in Cake against Egan that the Worcester rule that a reservation is a place where state cannot enter has,

and I quote, "yielded to closer analysis." And therefore the courts said that, even on reservations, state law may be applied to Indians unless such application interferes with reservation self-government or impairs a right granted or reserved by federal law. Well, you can well imagine that was a open invitation to the states to start enforcing state laws for the reservations. So the Supreme Court had to retrench. In each of those cases of Warren Trading Post and the Clanaghan Case that came up subsequently, where jurisdiction was involved, the court began to move back from the Cake rationale. It now talked about a federal pre-emption. In each of these instances where the state was trying to apply its law, the Supreme Court found that the federal government had occupied the field already and therefore pre-empted the application of state law. It is my prediction that the Supreme Court, because pre-emption is not going to work in all cases, is going to come back to tribal sovereignty as the foundation of its anaylsis for immunizing Indians and Indian tribes from the operation of state law on the reservation. They literally have no place else to go, and although it will take some devious twisting and turning in the light of existing cases, I think they've got to go there. That's where they seem to be going in the most recent case on the subject, which is Bryan vs. Itasca County, which was a construction of Public Law 280 which very much limited what seemed to be a clear statutory grant of authority to the state and the Supreme Court took it away.

All right, where are we going? Well, I think as I see the cases, that the Supreme Court, the current one (it's hard to say where it will go when the Nixon appointees are off), but at least the current one seems to be saying that where Indian tribes seek to exercise sovereign powers over

non-Indians, we will not uphold that exercise of authority. That's where the court went in the criminal case with respect to jurisdictional authority over non-Indians, saying no, the tribe does not have that jurisdiction.

There was another case, Deconteaux, that was up before the court four or five years ago and the question was whether the Sioux tribe there, a Sisseton and Wahpeton Sioux, exercised jurisdiction over their original reservation or whether that reservation had been disestablished and the tribe exercised jurisdiction only over the trust land that remained. And when that case got to the Supreme Court, counsel for the Indians was asked, "Well, in this area over which you say the tribe has jurisdiction, does the record show how many Indians are there and how many non-Indians are there?" And the lawyer answered truthfully: "The record does not show that;" and if he had stopped there he'd have been well-off, but he said, "I know the answer." And so the next question came; "What is the answer?" And he said: "There are three hundred Indians and three thousand non-Indians in that area," and he lost his case right there. You could just see the court was not going to let three hundred Indians who did not permit the non-Indian population to vote in tribal elections to make the rules for the three thousand others. And that question has come up in a number of Supreme Court arguments since: "How many Indians and how many non-Indians are we talking about in this situation?" So I see that the Court is headed in the direction of restricting tribal efforts to exercise jurisdiction over non-Indian interests. On the other hand, with respect to a tribe's exercising jurisdiction over its own members, or over Indian-owned property within the reservation, I see this court coming down with strong reaffirmations of tribal sovereignty. So I would say in that area tribal sovereignty is alive and well and living in Indian country.

Heth:

Are there questions, comments, reactions to this paper?

John Redhouse:

I would like to check to see if I understood the meaning of what was said in this address. I'd like to check to see if I could reduce what you have said, Mr. Lazarus, to one sentence by way of getting a thesis out of it. Now, before I do that, I gather that you are equating tribal government with tribal sovereignty, or at least in part of what you said I thought I heard that idea--

Lazarus:

Yes I think so.

John Redhouse:

But my thinking is this. Sovereignty, you implied, is something Indian tribes have in such rights of self-government or self-determination as the federal government chooses to concede or recognize. Does that sound about right?

Lazarus:

No, I would say my thesis went the other way--which is that tribes have all the powers and attributes of sovereignty except to the extent they've been taken away. And that leaves the tribe with everything that's not gone, while I think your formulation is only that which has been given to them. I think the two are very much different.

Redhouse:

Are they conceeded or recognized?

Lazarus:

Well again, my thesis is that where there is silence, the tribe has the sovereign power. And I think the way you formulated it, if there had been silence it would not.

Redhouse:

Again and again, you're saying what the Court says determines the nature of Indian rights. What the federal government does by way of the statutes determines Indian rights. You even said the statutes preclude and are overruled by what is done by treaty.

Lazarus:

Well, this is correct, that the exercise of sovereign powers by tribes is subject to control by Congress. But if Congress does not act, then the tribe has the power. And in many instances the Congress has acted to give tribes statutory powers in areas where they wouldn't have authority if Congress had not acted. In a sense, it's a two-way street. But I come back to my basic premise, which is that the tribe starts with everything, and you have to look to the statutes or look to the treaties, because treaties also limited rights. And look to the cases, too, to see where those rights have been qualified or limited. But if you do not find a qualification or limitation, then you go on the assumption that the rights don't exist.

Redhouse:

One could say the same thing about the individual. You start with everything under natural law, until those rights begin to get circumscribed by act of one government or another considered sovereign.

Lazarus:

Well, that's true.

Dr. Helen Hornbeck Tanner, Atlas of Great Lakes Indian History, Newberry Library:

Do you see, or think there's any possibility that legislation in the interest of conservation and environmental protection and so forth may place any further curtailment on Indian sovereignty--tribal sovereignty?

Lazarus:

Well, it already is. The Environmental Protection Act has been held applicable to Indian reservations. The Surface Mining Reclamation Act has been held applicable and made applicable to Indian reservations. Almost all of the federal laws relating to the environment or conservation have an impact on Indian reservations. Sometimes you are able to carve out special rules, but in essence the federal rule is going to prevail. It's going to be in the context of the federal rule that the tribe is operant. Now that's a clear-cut limitation upon a tribe's power to determine its own rules and regulations with respect to the environment. Tribes may be able (this is untested) but they may be able to enact more stringent controls than the federal government. As for example, to get into a completely different field, that's the rule in respect to liquor; that a tribe, if it wants to

allow liquor on the reservation, can adopt a rule more stringent than the state law. It cannot adopt a rule less stringent than the state law. And that is probably what tribes can (and many of them will) do in the environmental field. Here, in trying to be more rigid, you get the question: can they exercise control over the non-Indian corporations that are doing the polluting? But it is clear that a tribe will not be able to adopt a standard that is less stringent than the federal law.

Wilcomb Washburn:

Do you want to comment on the right of dissident groups to challenge corporations, for example, absentee--the tribal authority itself making that challenge? I think of the case in the Hopi area recently that was decided.

Lazarus:

I know the issue: the tribal government authorizes something that a dissident group does not want--what is its right to challenge? Well, individuals in society have rights to challenge governmental acts in a variety of ways. But I don't think the dissident group has any more standing than that of a group of individuals, and they'll have whatever rights individuals have to challenge the particular activity. But they are not recognized by the United States as a governing body or a tribe and therefore they're not exercising any tribal right in that respect. They may be able to find in treaties or statutes some rights that they can exercise, but it's not in terms of sovereignty.

Robert Gough, University of Wisconsin, Madison:

What is your reading of the role of environmental laws applying sovereign or some kinds of powers to areas external to the boundaries of the reservation?

Lazarus:

Yes, that's very difficult. This is the tribe which doesen't have polluting activity on the reservation but has the smoke coming over from something off-reservation. What can it do about it? Probably nothing more than any individual could do about it--in terms of enforcing the anti-pollution laws. The states have the same problems; something goes on in one state--what can another state do about it? You can look to the context of the federal law to see if there is an avenue for a state to file a suit or an avenue for an individual, but I don't think that a tribe as a governing body exercising sovereign power can do very much about that. This is a constant problem in international law--for example a river which starts in one country and flows into another. What happens when the upstream country uses up all the water? And what of the rights of the down-stream country? Well, we had a compact between Mexico and the United States over just that issue.

Dr. Fred Hoxie, Antioch College:

Do I understand you to say, when you're talking about the Martinez decision, that this case has effectively ended challenges under the Civil Rights Act of tribal government against tribal government?

Lazarus:

It has marginally; at least I haven't seen them--there may still be challenges coming into tribal courts and there are ways that a tribe can end up in the federal court notwithstanding sovereign immunity. But the whole raft of lawsuits that we saw in really a burgeoning of cases--that's just tapered off. And there was hardly a tribal election that wasn't challenged one way or another.

Dr. Walter Williams, University of Cincinnati:

Two questions. First, do you perceive the Court moving in the direction of anything relating to Indian groups that do not have a treaty relationship with the Federal government that may have treaties with state governments or not at all?;

and secondly, has there been any tendency of the court to go back further than even the Marshall decisions and look at any sort of indication from the Constitution itself which, albeit it says very little, about relationships between government and the question of sovereighty?

Lazarus:

Your first question is what are the courts going to do with Indian groups that are recognized as tribes by states and not necessarily by the United States?

Williams:

Or just federally unrecognized?

Lazarus:

Well, one thing that's happening right now is that by regulation there has been established a procedure for tribes unrecognized by the United States to get federal recognition, and periodically in the Federal Register we see notices that tribal groups are doing so. There are no major Indian groups, with perhaps one single exception, the Lumbees in North Carolina, that do not already have a federal recognition. But in any event, even the ones that do not now have federal recognition can apply for it. If they are recognized by the Secretary of the Interior, they will be treated by the Supreme Court just like any other recognized tribe, because one of the rules the Supreme Court has announced is that it will not go behind the Secretary of the Interior's decision. Recognition of a tribe is a political issue, and the Secretary recognizes or the Secretary does not, and the courts will abide by that. That rule was established maybe fifty years ago. Nowadays, if the Secretary refuses to recognize a tribe but the Indians have the attributes of the tribe and can prove it, maybe they could get into court and maintain the suits--something you couldn't do fifty years ago.

Now the second part to that question--beyond the Worcester Decision of Justice Marshall. The Supreme Court is not anxious to go into exercises of theory in the field of Indian affairs. The recent cases are badly confused. One can't find any single theme coming out of them. Worcester against Georgia is a very nice handle on which to rely. And going back into more sophisticated historical analysis--it's not likely, unless the court gets a brief from a lawyer who has done the analysis for it and it points very strongly in a particular direction. Now the court did do very interesting historic

analysis in the Eastern Indian cases. The Oneida Nation had filed a lawsuit under the Trade and Intercourse Act. New York State made a very vigorous defense that the Trade and Intercourse Act probably didn't apply to any of the original thirteen colonies and certainly did not apply to the State of New York. The Supreme Court did an historical analysis there that went back to the Trade and Intercourse Act, which was passed before Worcester against Georgia. The Court came up with the conclusion that the Trade and Intercourse Act applied to the original thirteen colonies as well as to the rest of the country. So, when called upon, it will do that kind of analysis; but basically it has to be called to the court's attention by the lawyer.

Heth:

OK, This will be the last question before the break.

William Fenton:

It occured to me on the question on dissident groups that was raised by someone that one might make a distinction between symbolic sovereignty and actual sovereignty. This is very well illustrated in the case of the descendents of the Six Nations of New York where, as you very well know as their attorney, the Seneca Nation has been in existence since 1848. It is an organized government that has certain sovereign powers that it exercises, and it holds elections and all that sort of thing. The Tonawanda band of Senecas retains the traditional system of electing chiefs as do the Onondagas and Tuscaroras. St. Regis in the north is divided between two simultaneous governments. Now, however, the traditionalists still maintain the tradition of the reality of the Iroquois Confederacy and meet in the Grand Council at Onondaga and issue pronouncements of one sort or another

which always catch the ear of the media and which in effect operate on public opinion and therefore have a certain diffuse if not organized sanction. No one really asks the question of what they represent; whether they really represent a sovereign power which in effect they can almost exercise or whether they're simply appealing to a tradition and to a symbolism which they have retained. It has produced some very interesting confusion and results both on individuals and on groups. I wonder if you care to comment on that?

Lazarus:

Well, that questions illustrates the importance of one of the points that I made at the beginning of my talk which is that you can talk of sovereignty, at least in practical terms only in the context of is the tribe recognized by the United States? The Seneca Nation is recognized by the United States as a tribe and exercises sovereign powers as a tribe which the courts will uphold. The Six Nations Confederacy, which at one time may have exercised the political authority, is not recognized today as being a sovereign or a tribe and therefore has none of the attributes of sovereignty in terms of legal impact. It is symbolic and you find that, as you have indicated, within tribes where there are those who will not recognize the Indian Reorganization Act tribal council as the real governing body of the tribe because "that's not the traditional way we did it." But the United States recognizes that tribal council as the governing body and that is the only entity which the courts will recognize as having the sovereignty.

Morning Session: Part II

Our respondent for this mornings papers is James Youngblood Henderson (Ausaugish) who is Cheyenne/Chickasaw and currently working as Patu's for the Union of Nova Scotia Indians. He has the Harvard Law degree, and is coauthoring a book called The Road which is about the problem of history versus justice and the American Indian.

James Youngblood Henderson, Union of Nova Scotia Indians:

There's a lot to respond to, and since I'm such a young man and these people have such experience, I'm hesitant to tell them that I disagree with so much; and I don't know whether that's because of my education or it's because of my youth. Anyway I'll speak what I'm feeling, and I'll try to be fair, which is hard for me.

Basically, I don't think we've heard anything about sovereignty. I think we've heard a lot about land claims, and we've heard a lot about tribal governments, but I don't think we've heard anything about sovereignty. And I don't even like to use the word because I don't what it means, and neither does anyone else in the world. Because if you're talking about a sovereignty that comes out of Western political tradition, and if tribal members allow you to stick us with a word instead of us talking about the word, we'll forever be quibbling over what you think you mean by the word instead of listening to what we're trying to say. Sovereignty varies from tribe to tribe so I don't speak in generalizations. I'm speaking basically for the Arrow Keeper, and basically for the Grand

Council of Nova Scotia Indians; that's where I come from. I also speak for my cousins and in the Sioux country, and also for my father's tribe, the Chickasaw, which gives me the ability to compare three versions of the word sovereignty. I guess what I dislike personally most about the word "sovereignty" is that it is devoid of any spiritual connotations because it comes out of Western political history at a time when they were looking for something other than religion and found legitimate powers in society. And that power they called it first: Jean Bodin called it "majesty", and later the English changed it to "sovereignty". But that concept of sovereignty was to take the place of God, was to create a secular society and in a secular society be able to create power that was legitimate, that people would adhere to. But when I talk about sovereignty, to me it's a mystical assumption. No one has it; no one possesses it. But no one really knows what it means anymore. Everyone keeps confusing governmental sovereignty, but sovereignty is the people who consented to the compact of the Constitution; but since in Indian affairs as well as other terms when the word sovereignty comes up to us, it comes up when the government does something: not the people, but the government, and the government hides behind the word sovereignty saying the people vested all this power in us, in the Constitution; and the states say the same thing when they want to talk about state power of government, of what they can do. But, like I said, it will go tribe by tribe because there's going to be no general solution to it. When we talk about political power, we're also talking about spiritual power, because if we don't have a spiritual, a cultural base to our power, to be legitimate, then we don't have the right to exercise the power. But the Federal government has a basic policy: it tries to remove the traditional leaders and only talk to

those who sign the compact by referendum in the IRA, the Indian Reorganization Act. It's a dichotomy between a compact government and a traditional government that comes from a union too long to remember for most Indians. But the government first passes an act called the Indian Reorganization Act and then says it applies to everyone. But the Indians voted on that, and that's an exception. The fact that this hypocrisy in society, between individual members and their private property: the sole thing that law was supposed to create is an ideal situation where all this hypocricy is working toward our being removed, toward reaching this mythical standard called sovereignty. So I don't like the term, but each Indian tribe will have something that they've already talked about; with a Micmac it's the concept of the chain. When we signed treaties with the English Crown in 1725, we didn't talk about sovereignty. We talked about a chain into which we're linked, coequal and together. With this chain there will be peace. Among my mother's family, the Cheyenne, we talked about it as a road, and we agreed to go down this road together of co-existence between the two governments. In other Algonquin tribes we talk about it as the fire. Those are the only terms that I personally want to talk about in terms of tribal power. But when we have to go to the courts in Canada and the courts of the United States, I have to play a silly game with English words not because any court ever said we are sovereign but because secondary writers keep repeating that phrase over and over like a drumbeat until they get the Indians talking about that term. And we don't know what they mean, but we know we want the power; we know the people have the will, and they want us to protect both the culture and the future. So we look at the classical cases in Indian Law: Johnson vs. Macintosh, Cherokee Nation, and Worcester, and we agree with them, and we understand what they were

talking about when they wrote it. But it's the people who weren't there at the time the chain was formed and the road was formed who can't understand it; and the primary culprit in this is basically Felix Cohen. And I totally disagree with his formulation of tribal powers and the source of sovereignty. It's totally mythic and it's a total breech of faith with my ancestors and what they entered into. That sure, we had all the powers of a nation, but we didn't want it. We didn't want to be involved in the European wars so we aligned ourselves with one power or the other and the Micmacs were the first to understand what it meant to be a nation, because they first were seduced by the French, then later by the British, but by the time America came along it said, "Come join us in the struggle against the Crown," we had learned the folly. Because what happens is it divides up the people because they can be bought off so cheaply. So we decided to sign this one treaty and end it; and we ended it in 1752. And we said, "we will be under the Crown." So we've never broken our word, and the Crown has never broken its word. But it is the legal profession that refuses to read our treaties for what they say, even in English. And it's the legal profession that finds it too difficult to read treaty by treaty as our forefathers meant them to read. Instead they come up with these absurd documents and absurd theories that hold that conquest gives legislative power. If conquest gave legislative power, why did they ever adhere to any treaties? If you already have legislative power, then you just have statutes. But the reason they couldn't do that is because the Crown in the treaty negotiations of Ghent nailed them on that proposition and they said, "You're trying to treat the Indians in the same way you said we treated you." For after all, the people of the American Revolution were arguing against the same thing we're arguing against today--and that's control by a bureaucratic government

instead of having freedom of society. Now Cohen, when he came up with the theory of conquest and legislative power, did not cite any case and there has never been federal court that said that prior to Cohen. And the ones who have said it lately say it in an unreflective echoing of it as if it's the only source that's around. They don't think about what they're saying. The only authority for the proposition of conquest relates to the Conquest of Granada, which explicitly says that these principles don't apply to the conquest of North America.

Now the confusion with conquest arises out of the Medieval mind. With the feudal judges, if you didn't get land through inheritance, you had to get it through conquest; but that was subsequently changed by the concept of plantations, by the concept of charters, by the international doctrine of discovery--given entitlement by the entering to Indian deeds originally, and then finally by treaty. Nowhere has the court, the Supreme Court of the United States, ever accepted the conquest doctrine. They always discussed it, but when they discussed it, they never based their decision on the case of conquest. It's only the 19th and 20th century secondary writers who are so used to "manifest destiny", and who look at it as a historical process who confuse the meaning of the words. I'll give you an example. What does conquest mean to the feudal mind? Well, if you read Blackstone he lays it out for you. It's not armed conquest, it means that you purchase the land, and it's a Gallic word. And in Scotland, they still use conquest to mean that one purchases the land, because one gets the estate not through inheritance but through another act.

The state of pupilage, the dependency theory: if you read Wharton on International Law which was published the same time as the Marshall decision, it means a nation was entered into a treaty through which they became protected--that someone was supposed to protect another person. That's what dependent nations were. The guardian/ward relationship, the state of pupilage, is another linguistic confusion of people not going back to their roots. Marshall was using Roman Law, not English Common Law, and in Roman Law a warden and a guard implies an independent self-regulating community aligned to the Emperor or a stronger house.

The concept of a ward in contingency has been abolished in English law anyway, sixty-seven years before it was ever used by the United States courts. There's just no court that ever said conquest gives legislative power, because the best one can do under the United States Constitution is obtain executive power, and one obtains executive power through a treaty. The Indians entered into the treaties as independent nations and came out as protected nations. And that wasn't bad because then they could get on with the business of dealing with their internal affairs. It's treaties which give the U. S. authority to regulate the tribes, but they don't give it to the U. S. generally. They delegate it very specifically, and those powers not delegated to the executive in the treaties are reserved to the nation or to the grantor. That wasn't a unique push of Indian law. That was a law of nations at the time those treaties were entered into. There was not, before 1921, one statute passed which was not tied to implementing those treaties. The whole confusion comes out of the Snyder Act with which the Bureau went in and said, "It's too hard coming in here to fulfill these treaty obligations each year and you guys telling us no or yes. We want

general authorization to pass allocations on these topics." In Congress, the Appropriation Act gave them that power, and then the very next year we saw mining and mineral regulations coming out of Congress as statutes. Then we see Congress coming out with a Citizenship Act that says we're citizens, if we want to be, because the fundamental problem with citizenship is that the United States as a matter of constitutional law, it has to be a matter of choice. You cannot force citizenship on any people and that lesson was learned right after the Revolutionary War when they tried to force citizenship on French and British subjects merely because of the Revolutionary War. And the courts unanimously agreed that you cannot force people to become citizens of the United States. It has to be consensual. Then we find Congress realizing that its got some real problems in passing the Indian Reorganization Act. And all that does is recognize our power, but it had an insidious clause that's in there from the traditional governments' point of view. It said that if you want to reorganize under the Indian Reorganization Act, you have to have a referendum, and that the majority of the tribe votes for this new form of tribal government, then you can be a tribe once again.

In comparison to rules by the Department of Indian Affairs it was a good option. But it substituted for the old traditional sovereignty (the aboriginal sovereignty) a new concept of sovereignty called "compact theory." They consented in the referendum to become a tribe and they started falling under the spector of a constitutional provision of the consent of the people. The people consented to these tribal governments and those tribal governments still exist. But nowhere in the act does it say that it modifies the power of the old traditional tribal governments. The Micmacs

and the Southern Cheyennes have refused any concept of abolishing traditional government for an Indian Reorganization Act government, but in turn we were treated with less respect by lawyers, because they want us to look to Congress to find our rights and that's the evil we're fighting against.

The treaties are important because they're used against us everywhere we turn. While they say we're not foreign nations, they speak of our treaties just like they were international treaties for the purpose of abrogating them; for our theory is that those treaties formed a union between the Indians and the Federal government, just like the Constitution formed a union between the thirteen states. The same historical theories, the same political liberties linked us up, but we're linked up by different documents and in different ways, and there is no general Indian treaty, because all treaties had a purpose; and that was to modify our international position. The Privy Council of England in 1734 and 1774 confirmed that we were a separate polity from anything they had. We were not their subjects. And that's the standard which Marshall built upon when he went into those cases. When one reads Worcester or even Cherokee Nation, many people don't understand what Cherokee Nation says. They said we are foreign nations in the sense of the Constitution and that was correct, because we had entered into a treaty with the United States which said that versus all their allies we would give them the external power. But they had no more power than we delegated to them. And then once we delegated this power to the executive, and it was ratified by the Senate, then only they could pass laws regulating the commerce between us. But the Commerce Clause gives them no authority. It only gives them authority versus the states. That's why in every Indian treaty you find, one of the first things we did was to say,

"Yes, you can regulate the commerce only between the white people. That its your job. That will give us greater protection."

So Marshall was right. We weren't foreign nations, but it was the non-Indian attorneys who were representing us at that period of time who thought they had to make the argument that we were foreign nations, even though the treaties didn't say that. We thought we had to get into court, to get jurisdiction of a court. Many people have now come to regret ever trying to seek its protection, because it has gone berserk on us. It no longer listens even to the statutes of Congress because you get this silly infringement test out of Williams vs. Lee which says state action can't infringe on tribal government. But that's not what it says. It says "absent a Federal statute;" and there is no absence of a Federal statute since 1934 when the Indian Reorganization Act said we have all the powers we had before 1934 existing in law.

Now we argue endlessly over encroachment because everyone reads the second part of the infringement test and forgets that as long as there is a Congress and as long as the Indian Reorganization Act is on the books, we don't have to prove we have our powers in existence. The Federal government has to prove that this specific tribe gave them the power to pass laws over us. Because if they can't point to it in a treaty, they can't find in the commerce book. The Commerce Clause only implements the treaties that we've signed with them to form the union. Other than that, they have no legislative power.

The people think our ancestors were ignorant. They think we have to go to the Federal government to even tell us when a tribe exists and when it does not. I mean, we can't even consent to our tribes. We have to run to the Department of the Interior for the Secretary says, "Do we look like a tribe to you?" "If we look like a tribe, can we be one?" Where is the consent of the people in there? All power comes from the Federal department. You cannot have a period of plenary power of Congress, which was originally created to describe plenary power versus the state, now being applied to us as tribes and still talk with sovereignty without feeling like an exotic pet of the federal government.

We have all the sovereignty that they will allow us, and that's one definition of sovereignty. Where did Congress get all this power? Who gave it to them? And why don't the courts listen to what Congress says? The courts, especially this recent Supreme Court is absolutely crazy as far as judicial craftsmanship. The ultimate decision is this, which is a terrible case to take up in the first place, basically because all the white people that are on the reserve, if you question all of them, were enticed there by the tribe under an economic development project. But anyway, it is a terrible, terrible fact situation. But the Court even compounded their error by raising a specter which had never be created before, and that is that if the violators of the criminal code, either the Federal government or the tribal government is not an Indian, then we don't have jurisdiction over him.

And that's the betrayal, because we worked. We worked real hard to improve our court systems to come up to Anglo-Saxon standards, to break

with the traditional law, to break with the common law of our people just to improve our court system so we could deal with non-Indians. And then they turn around and betray us by saying, "We never had any jurisdiction over them in the first place." So why did they pour all those thousands of monies to upgrade our court system? Why did they take our judges down and train them in then Anglo-American law if the only form of jurisdiciton we're going to have is over our own people? And then when we talk to them and suggest, "let's go back to the traditional law," they say, "No, we've got you there. You should be trained in American law because that is superior to your traditional law." So they just fooled us.

Each year our courts get more and more like non-Indian courts. Each year, our educated students of the tribe become more and more non-Indian orientated in their thinking. That if they want to find out about the history of the tribe, they go to the library instead of going to the elders and when they go to the library they don't even look in the legends of the tribe. They look in someone like Cohen or they read a court case. That is the tyranny of the system, that basically we're trapped between a hostile bureaucracy that wants to retain power over our lives on this earth (and this is in Canada and the United States) and trapped between a legal system that cannot respond to our desires. The Indian Civil Rights Act in 1968 is a classic example. It took us almost ten years to convince the court that the district courts and the federal courts had no business getting involved in tribal or political affairs. And Congress didn't even give the courts authority to intervene into those disputes. The court just assumed its own role in our tribal affairs; and, finally this court has said, "I don't see where we have jurisdiction over these disputes." But for ten years they

went around modifying our tribal elections, our tribal decisions, our membership clauses, which are all basically political questions which the courts so conveniently use against us when we ask why the Secretary of the Interior has so much power. A political question is a political question. Basically this new generation of trained Indian lawyers, trained Indian students will probably be coming forth with a whole new concept of what the tribal leaders meant in the past if they pay attention to the people who know that side of the history rather than listen to the other side all the time. I don't know if there will be a forum for that, but if there's not a forum then we will be the last generation of negotiators.

Heth:

I'd like to encourage you to ask questions or to respond. You have a few minutes before we have to go to lunch, and I would also like to encourage you after we break for lunch to talk to some of the men about these ideas expressed this morning. Are there any comments or questions?

Susan Power, University of Chicago Law Review:

I would like to say one thing as a Sioux growing up not knowing Standing Rock as a reservation but always as a nation whose tribe voted down IRA knowing full well what was going to happen. I want to thank you very much for reaffirming in what you've said all the things so many Indians feel. You said it so eloquently. Thank you.

Dorothy Jones, University of Chicago:

If you were to hypothesize an ideal situation, what do you think the protection (here in today's context), the protection from United States or the Canadian government should consist of?

Youngblood-Henderson:

We should have no less power than any other states or provinces.

Jones:

So the protection would simply be in regard to exterior relations with the rest of the world. You would have a sort of similar power as foreign nations.

Youngblood-Henderson:

Yes, they can continue their warfare forever.

Sandra Jones:

I have a question and it may need to be addressed not only to you but to the council on either side of you. As I understand it, and correct me if I'm wrong, under the IRA Indian organizations had to organize according to the Anglo-Saxon concept of democratic representation, which is the way you've got most tribal organizations set up now. If a tribe wanted to have a different kind of sovereignty or organizational rule over their own people, could they then so establish one, or would that put you outside the limits of the law that the United States has set down, i.e. chiefs rather than tribal chairmen?

Youngblood-Henderson:

If the U.S. believes in its own political legacy that it gave the world: the freedom of choice, the right to enter into compacts, to form unique societies. If they still believe, and if that's still the ruling ideology in American politics, then it's not inconsistent.

Jones:

Is it probable? Theoretically possible?

Youngblood-Henderson:

To my kids and to my brother and sisters who are younger than I am, it will either be that or become welfare victims.

Clair Farrar:

I have a question concerning the definition of internal versus external relationships, and I'm thinking particularly of those Indian people who have banded together, who have natural resources--particularly oil--becoming very strategically and economically important. Where do we define the boundaries between internal and external in such situations? Are they as a group of dependencies, if you wish to call them that, dealing with the United States Federal Government as an external or as an internal group?

Youngblood-Henderson:

It would be internal. There is no independence in natural resources in the whole world.

Wilcomb Washburn:

Yes Jim, perhaps could you clarify this a little: If a majority of present members (let's say of a particular tribe) want to go along with the IRA concept; are you saying that the will of that majority of that particular Indian group at the that time should determine or that it should not determine the direction which the Indians wish to go?

Youngblood-Henderson:

Basically, it's a tribe-by-tribe determination. Basically I would agree with whatever the majority of the Indians did at that time on the reserve. If it was a majority and I could feel in my own heart that it was fair, but then I also feel that we have the same right to reorganize now by the same type of vote procedure. It's in the Indian Reorganization Act if we wanted it. But there would be great hostility toward it by the Secretary of the Treasury and also the Secretary of the Interior.

Washburn:

Well, let's see: I wonder if maybe Mr. Lazarus could inform us about that--is that in fact the case? I mean, if for instance now an Indian tribe wanted to reconstitute its organization, is there any provision under the act as to how that would be done and what would be the parameters and so on?

Lazarus:

Every constitution has in it a provision for amendment. If a tribe wants to amend it, all it has to do is propose the amendment. I think actually in the current climate in the executive branch, if such an amendment were

voted up, the Secretary of the Interior would approve it. But the chances that a majority of the people at the present time would give up the vote and go back to the chiefs are pretty slim.

ADDENDUM

"Communication of James Youngblood Henderson, April 9, 1979,"

(written in anticipation of the Sovereignty Conference)

I have often stated the opinion that the established legal profession is the greatest obstacle to tribal self-government in the last decade of the 20th century. As I read over the outline of Mr. Lazarus that same haunting and mystical reeling spoke to me again.

In essence, the outline of Mr. Lazarus is a 1940's argument merely updated with new cases. Cohen, himself, could have presented it (and while that is both a compliment and criticism) to your audience. It is an example of conceptual conservatism that the "old time" Indian affair bar which is destroying any hope for a future of tribal sovereignty. Nowhere in the outline is the nature of tribal sovereignty in a constitutional democracy expounded upon or have the courts been forced to confront this issue. Mr. Lazarus has been an attorney for tribes for a little under a quarter of a century, and still he relies upon the paradigms of Cohen to discuss "tribal sovereignty." While this criticism is not meant as personal, it illustrates the divergence between legal theory and fact which has predominated since colonial times among non-Indians, even those like Sir William Johnson, who are directly involved with Indian affairs. In their hearts, they simply do not understand tribalism or its potentials, and this makes my heart heavy.

For tribal sovereignty is neither pragmatic to me, nor is it to my family or tribal members, it is a matter of heritage and spirituality. Most of us could care less of the attributes of sovereignty or specific tribal powers-that is the concern of the practical gentlemen of Indian affairs, and the elected politicians of the tribes. To us tribal sovereignty is a matter of the heart and a concept which is supposed to be a wall between tribalism and the society of immigrants. It is a shield for our world view, our legacy, and our culture derived by <u>others</u>.

As a tribal citizen, I resent attorneys projecting on their Indian clients the same political motivations and beliefs they hold themselves. As a lawyer who is also a tribal citizen, as an ethical and practical matter, I reject any practical test of tribal sovereignty until the precise relations between constitution federalism in the United States and the tribes is cleared up. Sure, tribal sovereignty is theoretical, but the

practical application of tribal government is not synonymous with the concept of tribal sovereignty--yet others attempt to force us to accept that proposition. The exercise of tribal sovereignty is a tribal political question, not an issue for federal courts. The unresolved issue is the nature of the political bond between tribal authority and the United States of America: i.e. tribal sovereignty to non-Indians; but the chain to the Iroquois, the fire to other tribal groups, and the road to the Plains Indians.

The fundamental and perplexing question which haunts me (as well as other tribal members who are attorneys) is the relationship in law between the lawyer's language and my cultural patterns of thought. Can we hope to make our cultural world-view consistent with the inherited and traditional language of the white man's legal system? Can we talk about law in the existing categories in a way that recognizes the context of our tribal world-view, or must we compromise tribal world-view for a discrete professional language which is assimilative?

Once it is recognized that lawyers are trained to see things differently from other people, that our minds are supposed to work differently, it is important for tribal citizens to ask what it really means to be a lawyer or to "think like a lawyer?" Is being a lawyer something you can put on and take off like a suit of clothes, or is it a form of cognitive imperialism? Who is in control of whatever process of change goes on, who determines what you gain and lose?

The issue which surrounds "tribal sovereignty" in American law versus the tribal ideal of the chain, the fire, and the road is a critical part of my vision quest. In reading and studying "Indian law" in America, "tribal sovereignty" is a symbol of tribal identity in the language of the law. It is not derived from case law or positive statute, but from legal commentators. It is not a tribal term or concept, but rather a referential or condensation symbol. To the tribal world, it is a referential symbol. It is an economic way of referring to the legacy of their treaties and their vision for a better Indian society. To the federal government, it is a condensational symbol of the glory and humiliations of the Indian people to be used in obtaining funds from Congress, as well as an excellent way of exhausting the energies of Indians in passionate attachment to abstract and remote objectives while concrete tribal power is continually eroded by the Federal government.

Into this historical drama are thrust lawyers. They usually learn the concept of "tribal sovereignty" as a tool, and begin using it in a typically cast of mind and habit of thoughts under the spill of the "legal mind." Since tribal sovereignty in legal terms is ambiguous, at its best, it gives lawyers, judges, and administrators an economic, social, and political purpose. Part of the continuing popularity of this flexible term is its ambiguity supercharged with the emotions every tribal citizen associates with a promise of future greatness. This appears to be the greatest utility of sovereignty as a legal tool: the concept of "tribal sovereignty" satisfies both lawyer and client, goes on indefinitely because in its current formulations cannot threaten the federal government.

This drama is inherent in the divergence in legal theory and fact of sovereign in your paper and amply illustrated by Mr. Lazarus' outline. For a tribal citizen to yield to the temptation and pressures of legal education and legal profession: the desire to have the preceptions and capacities which modern society calls a legal mind--and continue the cant of tribal sovereignty is to deny their culture worldview. Tribal citizens educated in non-tribal schools, must stand outside the legal language system and look at it from our own experiences, the wisdom of the elders, and a genuine understanding of our culture and its political objectives.

From this position, I find myself confronted with the question: Does the language of modern law have a grandeur with which to match the proportions of our tribal legacy and vision for our children? My personal answer is that both Western political theory and legal language are inadequate to express our forefather's notions and our legacy of freedom. This is a gulf between their conceptions and our worldview: for conscience, after all, is very different from medicine. The closest concept is that of political liberty--but still it's not close.

The position of tribal sovereignty in modern law of the United States has a historical precedent; one might conclude it is like Oliver Cromwell's failure in English political history. One might conclude from Clarendon's History of the Rebellion that Cromwell's failure to build new and lasting institutions was a failure to find new ways of talking and thinking about his vision of political liberty. Clarendon portrays him as one who accepted an inheritance of political language and habits of though and the old forms of government they implied, with the consequence, fatal to the permanence of his revolution, that the only expressible difference between his and royal rule was legitimacy. (Books 14 and 15:1702; Macrey ed. 1888).

Tribal leaders, in my opinion, face this same crisis today. While we seek to build upon our political legacy which has been handed down from generation to generation; new institutions of government and the language of the law has us connected to a different political tradition which may eventually destroy the tribal concept of government as well as culture.

Hypocrisy of non-Indians can never destroy a tribal society; that is the lesson of our history. But quiescense, unreflective acceptance and unreflective utilization of the concept of tribal sovereignty by tribal leaders and citizens because some lawyer thought in those terms and lawyers are supposed to be saying something intelligent--this process may destroy our cultural inheritance and political future.

What is the history of the concept of sovereignty? What makes it so important for our future? If tribal society is going to use the term "sovereignty" as expressive of its goals in modern society: they should know something about its histories as an intellectual concept rather than excepting is modern usage. The fact that there is hypocrisy in its use over the ages is not important at this point. The reality of hypocrisy is more a function of Western consciousness than tribal consciousness.

To a tribal society, there is little moral doubt: the law, the culture, and art will all express that the ideal and actuality are at root inseparable. But in modern society, a different view of the link between the ideal and actuality, and thus of the nature of each, carries along with it hyprocrisy as well as a change in the conception of the mind.

In tribal society, reason is the awareness of a highly concrete ideal implicit in reality. Reason of this kind knows no distinction between is and ought or between theory and practice. In modern society, reason must now be broken up into distinct faculties: the choice of means for the achievement of one's interests and the perception or statement of abstract ideals; the former devoted to what is,the latter to what ought to be--one instrumental, the other comtemplative. Between them stand still a third faculty whose relationship to the other remains obscure and ambiguous: the theoretical knowledge that, though concerned with the actual world, is pursued for its own sake rather than as a handmaid to interest.

The intellectual history of "sovereignty" corresponds to the distinction in modern society between "what is" and "what ought to be." This is not to be unexpected for a concept which is a product of civil wars of Europe. In the violent transformation of European society, reflective men came to ask whether a purely political foundation could be established upon which society could be built distinct from the existing religious foundation. They wanted to found society on a base other than religion, since it was obvious to them that religion could no longer be the basis of social harmony as the Reformation and individualism emerged out of community in the sixteenth century.

In The Commonwealth (1576:1591 edition), Jean Bodin emerges in the sixteenth century with a concept of majestas which established the framework of what is now called "sovereignty." Bodin was trying to find the nature of political authority without religion; he wanted to define respublic (what we now call the state) in a manner appropriate for all states from the tiniest city-state or clusters of households to an enormous empire. Size was not a determinate element, but rather what was crucial was the element of majestas in the respublic.

The respublic or Bodin's state was defined as a rightly ordered government based on laws of nature which several families, groups and associations shared in common. Majesta or la souverainete or sovereignty was a transcendental concept of the highest power over the families and fraternities which was not bound by their laws. It did, however, function amid other authorities; political authority is not abolished because of the concept of the sovereign. Majesta sought to structure and coordinate common concerns which all families naturally share. This was accomplished through amity, friendship and sharing because people are by nature gregarious.

Bodin was not concerned with "power" in itself or the personality of the sovereign, he was concerned with the authority which justifies any exercise of power in society. Majestas entails, for Bodin, supreme power, dignity, and worthiness of being reverenced among the families, yet limited by natural law, the law of nations (jus gentium), to a lesser extent divine law, and certain fundamental laws which make the existence of a respublic possible. Included in these limitation on majestas was the nature of private laws in the respublic touching possessions and property.

Political authority, Bodin understood, exists within the matrix of society, and society has a continuity through history. No political authority can violate private property. If the majestas owes something to any family or to anyone he must pay for it; he observesthat majestas observes treaties by natural law since everybody must be given what is his own. The majestas could not change the fundamental laws to challenge or undermine its very capacity to widen friendships. The laws can not be changed without someone being cheated (principim legibus civilbus derogare posse, dum tamen id fiat sine frande cujusdam). At 162-3.

It is in Bodin's sense that most tribal leaders and members see tribal sovereignty, with the sovereign being religious rather than political. But modern society understands in a sense of Thomas Hobbes.

During the English civil war and political chaos, Thomas Hobbes published his version of sovereignty in the Leviathan (1651) to recast the political order on a new concept of political authority based on the individualism and scientific method.He attempted to place reason as the foundation of political theory and supposes that the current sad estate of English political order is based upon the fact that men misunderstood how to make lasting political order. The commonwealth was not something found but rather something made by men. Men are torn between the quest for individuality and the quest for community, thus a balance must be struck between these two demands if there is to be a stable social order in England.

Men move from a state of nature to a political society; the state of nature is where men are free from all laws and authority--like in European warfare. Society, to Hobbes, was not a work of brotherly associations but a calculated instruments of self-preservation. To enter society, men covenant to surrender some of their individual freedom and tolerate some inequality, at least that of command and obedience, and create a Commonwealth (in latin civitas) and overcome individual nihilism.

In the instrumental establishment of the Commonwealth covenant, each personal quest for a balance is provided by political authority. Each obliges oneself to obey the political authority, i.e. sovereign, and to accept what the sovereign shall decide is necessary for the preservation of peace and security. But the sovereign is not party to the covenant, it is the creature of the compact. The sovereign is judicial, executive and legislative head of the state: he has the power to determine the distribution of property in that society as property rights as they are seen as not natural but a creation of society. The sovereign alone has the right to exercise judgment on what is necessary for preservation of the people, so it alone remains in the state of nature. The sovereign defines the basic rules and concepts which operate in society to create order and coherence, thereby giving human life a great deal of safety and security. All liberty is at the sovereign permission.

From the analysis of Bodin and Hobbes, it should be somewhat clear that sovereignty is a mystical assumption about the existence of legitimate political power in any given society. It describes the mystical source of goverment that varies from society to society, but is never absolute within the society. It is a relational point of depature which allows society to discuss government in practical and rational ways, but not the actual substance of government.

The revolutionary idea that united the framers of the American Constitution was that sovereignty, that is, all legitimate political power, must arise from the consent of the people. The consent must be be freely given by the people for as a mystical assumption they are sovereign. The Tenth Amendment guarantees that to the People the power to govern their lives except to the extent that they have freely delegated part of that power to a state or territory or national government. Drawing their inspiration from John Locke's characterization of the state as the product of a "social contract," the people ratified both the state and federal constitutions.

The people first delegated certain limited, specified powers to the state governments, and later independently delegated some of these same powers as well as other additional powers to the federal government, but reserved the rest, as the Constitution was careful to note, all the balance to themselves. "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is," the Supreme Court concluded in 1804, "the basis of which the whole American fabric has been erected."

Sovereignty is the people in the theory of the United States of America, but the government is the creation of the sovereign. They may allocate it among different institutions in different ways, as they see fit; and once they have done so, only their same collective agreement can alter it.

Unhappily the legal profession and many Americans today do not understand sovereignty in this sense, but conceive of it the way it was understood by the British Crown before the American Revolution. British imperialists resisted American colonists' demand for local self-governing assemblies and so precipitated the war, by arguing that sovereignty is a quality (in the words of Blackstone) "supreme, irrestible, absolute [and] uncontrolled," it was only capable of existing in one government at a time. They rallied behind the fundamental maxium of the Roman Empire that imperio in imperium--an empire within an empire--is a contradiction in terms, implying that the colonists' proposals for a federal union of England and the American plantations united under a single, combined Parliament were morally and philosophical unnatural. This was the ideological target of the constitution and resulted in the successful American Revolution. Can it be a legitimate principle of constitutional law today?

The American system of federalism recognizes the fact that many "sovereigns" can usefully co-exist in the same territory if their respective powers and responsibilities are clearly fixed. Federalism is simply an allocation among a central and any number of local governments of the power to define and maintain the quality of our lives. Federalism affords Americans the strength of unity in international affairs and the overall prosperity associated with a large, uniform system of commerce. At the same time, it makes it possible for them to enjoy a great diversity of environments and lifestyles, maximizing their ability as individuals to seek or create the socio-cultural habitat we most prefer.

Federalism offers Americans more freedom, as individuals, than a centralized, albeit democratic government. Therefore, in talking about the

sub-divided sovereignty that characterizes the federal system, let us use the word freedom instead of sovereignty, and think of things in terms of the problem of protecting and increasing freedom rather than competing for power.

One of the most extraordinary things about the draftsmen of American Constitution was their unanimous agreement that national tyranny would be impossible so long as local governments remained free and sovereign. They argued that the Bill of Rights was less important than local self-government for the preservation of liberty; for the Bill, like the rest of the Constitution, is only a "paper barrier," in convention delegate James Iredell's words, but strong local governments can economically, politically, and, if necessary, every militarily resist abuses of national power. In the furtherance of their own self-interest local sovereigns will jealously guard their reserved powers, checking, and balancing one another, keeping one another honest. Naturally this will be so only if the people themselves value their local institutions and support them, the way tribal citizens do. If by American education we are taught to petition Congress for the relief of every complaint, howsoever small, we shift this balance to the center and lose its capacity to protect our freedom.

Political diversity has the power to keep people free from tyranny, as well as the quality of increasing personal options--i.e. freedom of choice.

The political essence of the American federal system, then, is something I will call unity in diversity. It reflects a belief that a diverse people will strive to defend the laws of a government that affords them freedom to be what they are. It reflects a belief that freedom must be both collective and individual--freedom from over-reaching laws as well as the freedom to make laws. It reflects a belief that collective freedom involves the right to organize local institutions to exercise the powers of government reserved by the people in the constitution. Most of all, it reflects the sure knowledge that the coercive suppression of diversity makes people look more alike but polarize their beliefs and affections.

Now that the roots of the concept of "sovereignty" and the constitutional doctrine of sovereignty and federalism have been outlined, let us turn to the formulation of tribal sovereignty as developed by Mr. Cohen and presented by Mr. Lazarus in this outline.

The prevailing formulation of tribal sovereignty holds that the non-tribal society can tell tribal people what sovereignty is rather than the spirits of our ancestors and the legends and stories which were created to inform tribal society of its role on this earth. Similarly, it holds that Cohen and the courts can also tell us when we are a tribe or Indians or anything else in the world. This is not always expressed but it is always an operative assumption or source of value contagion of any discussion of tribal sovereignty. It is the assumptions of legal sovereignty in modern society: law holds society together, not spirituality or worldview.

Law in modern society is mostly determined by cultural myths that dominate the minds of the controlling elite in society. It makes little difference to tribal people whether or not statutes and regulations or court decisions are involved, from our standpoint they are all myths because

they act as surrogates for some social realities beyond the comprehension of the common person in modern society. As myths, the law may sometimes represent the realities in criminal law or contract theory, but they may also represent the realities more or less falsely as in the case of certain classification of food, drugs and alcohol. Nevertheless for most members of modern society, these myths are accepted as literal truths or accepted as authority not to be questioned.

Accordingly, tribal sovereignty, like the idea of a corporate personality or the concept of a nation or state, are metaphorical concepts which are more convenient rather than rooted in any reality or modern life. To discover this fact, the obvious fact to lawyers, is to just begin a search for truth rather than know-how. Such a discovery should not be considered an end, but the point of departure for men of knowledge in tribal society. From this perspective let us examine the Cohen formulation of tribal sovereignty.

A. An Indian tribe possesses, in the first instance, all the powers of any sovereign state.

This proposition recognizes that Indian tribes are a political community equal to any other sovereign state in public law or as it is now called "international law." The source of this power to Cohen was the "will of the Indian people" under the equivalent will of the people as sovereign in constitutional theory. Most lawyers can accept this notion because it is common. But I would suggest that to my forefathers this notion was revolutionary because the government was one of spirituality rather than sovereign. It was the spirits of our ancestors which held the clans, bands, and tribal society together, not any theory of a social compact. It was a spiritual compact.

Cohen is right, however, for those tribal societies which established tribal government under the referenda process in the Indian Reorganization Act of 1934. The referenda was a social compact between the tribal members, while the tribal powers were derived from the spiritual compact. For those tribes which remained under traditional government, like the Southern Cheyenne, the source of sovereignty is still spiritual. This distinction is usually lost to non-Indian and even to many Indian lawyers.

What is the proof of this proposition in law? How can we tell whether or not Indian tribes had all the powers of any sovereign state? For some, the best proof is the continued validation of Victoria paradigm of Indian rights explained around 1550. In Victoria's writings he stresses that the natives were sovereign and absolute land owners until a consensual purchase of their land was made. But for me, the best proof is this proposition are the treaties between the tribes and the European Crowns and the United States of America.

A treaty, or the feodus in Latin, is a compact or contract entered into by sovereigns. In the era of tribal treaties with the United States, international law created the advent of nations which though sovereign, were not dependent on sovereigns, could enter into for and on behalf of the entire nation certain forms of agreements called treaties or compacts or contracts. The right to enter into and form these treaties was an insep-

arable attribution of sovereignty. But the right to make treaties did not rest upon any general principle or doctrine of international law; it rested upon the fundamental law of each state or nation. In the United States of America, the fundamental law was article II, sec. 2 of the Constitution; in the Indian tribes and nations the decision of its councils was the fundamental law.

To the Marshall Court and the writers of international law, treaties were negotiated between states for definite purposes. Treaties were generally entered into when it was in the interest of the states to vary the simple and natural principles of international law or desired to set forth with greater clarity a correct exposition of the law of nations. When the object of the treaty either expounded correctly existing principles of international law or substituted some special rule in place of some already acknowledged principle, the Court held that, as between the parties, the treaty was completely obligatory. To those states not a party to the treaty, the general rules of international law remain applicable. Where such compacts or contracts could not be found, the Supreme Court in 1808 said, the rights and obligations of nation must remain "precisely in their natural state, and [are] to be ascertained by some preexisting acknowledged principle" of the law of nations.

The rationale of the Court was consistent with American political thought: a treaty itself, and therefore all the articles of such a treaty, needs the consent of the parties before it can operate effectively, and hence, as to those who have not consented, their rights must remain as before, unaffected and unchanged. Treaties, to the Court, were social contracts between nations.

Tribal societies or tribes and Indian nations were recognized by the Executive and Senate as proper parties to negotiate treaties. Hence the fundamental law of the Constitution recognized and concluded treaties with Indian tribes as sovereign states and nations under international law and Constitutional law. Likewise, the tribal societies accepted the United States of American as proper parties for treaty negotiations rather than the various states. This legal fact alone, not the terms of any treaty, illustrates that before the Indian tribes of American consented to any treaty, under the preexisting acknowledged principles of the law of nations they had all the rights and obligrations of other states. This was also reinforced by the holding of M'Intosh, Cherokee Nation, Worcester and Mitchell. The fact that Congress as a policy sought to end treaty making with the Indian tribes in 1871 is a matter of American constitutional law, for the act also established the obligations of contract clause in the Constitution.

The important point is that the process of formation of treaties is beyond judicial inspection because it is a political question. The Constitution made treaties part of the supreme law of the land. The Constitution also imposed on the courts merely the duty to interpret treaties: yet, under law, their interpretation neither binds the other parties to the treaties unless expressly stated in the treaties nor relieves the United States as a nation from any obligation under the treaty unless unconstitutional. Therefore, in a constitutional scheme of delegated, it is not the tribes responsibility to identify precise treaty authority for its

continued exercise of its freedoms as a sovereign state or political existence; rather it is the task of the United States to rebut, using direct evidence of express tribal delegations of consent to modify the existing principles of sovereignty of the tribe in a treaty and delegating authority to the federal government to interfere in its internal affairs.

b. Conquest renders the tribes subject to the legislative power of the United States.

This proposition originated in the legal mind of Mr. Cohen. It is totally inconsistent with the classic opinions of the Supreme Court and basically a mytho-historical concept. If tribal sovereignty can be attacked as a fiction, then conquest can be demolished as an unnecessary and pernicious fiction derived from the medieval legal tradition and overruled as a legal concept in the nineteenth century.

The origins of the concept of conquest is from medieval property law. The archaic property law doctrine of medieval courts held that what does not come by descent to the King must come by conquest. Blackstone in his Commentaries explained that conquest was used in the feudal sence to mean a purchaser of land rather than one who inherits lands. (243-244: Jones, ed. 1916) As a valid concept of law, this doctrine was overruled and transformed in English law by the succesive concepts of (1) dominions acquired by plantations, (2) royal charters and letters patents, (3) the doctrine of discovery, (4) Indian deeds and (5) Indian treaties.

In Campbell v. Hall, the English court discussed the reception of statutory and private law of England in colonies acquired by conquest and settlement against European nations. In discussing the reception of English law, the Court stated that "It is only by positive enactments, even in the case of conquered and subdued nations, that their laws are changed by the conqueror." Hence, not even conquest can give legislative authority unless by positive enactments. The colonies in America were expressly exempted from this opinion. Moreover, the public law of England, i.e. treaties and royal instructions and proclamations, was received in the colony regardless of method of acquisition.

The conquest theory was laid to rest in public law of England and in American law in favor of treaty federalism in the Royal Proclamation of 1763, M'Intosh, Worcester, and Mitchell. The term treaty federalism is my own, but it is merely an attempt to explain the traditional concepts of the chain, the fire, and the road into modern legal language. It symbolizes a co-equal union between the tribes and the federal government, not a master-servant relationship or a superior-subordinate relationship. The wampum belts are a visionary representation of the compact.

Consistent with the classic cases of tribal law, the federal courts have never held that the war power is the constitutional source of legislative power over Indian tribes. In McClanahan, the Court observed

> The source of federal authority over Indian matter has been the subject of some confusion, but it is now generally recognized that the powers derived from the federal responsibility for regulating commerce with Indian tribes and for treaty making.

There is no mention of the war powers. If the constitutional source of legislative power of the United States is conquest, as Mr. Cohen postulated and many court have unreflectively echoed, why is the war powers omitted in discussing the source of federal authority? If the Court do not say that conquest is a constitutional source of power, how can the law of conquest later determine the scope and implementation of tribal power? This is another legal riddle of tribal law.

Even if one looks at the issue as property law it makes little sense. The link between property and political power under the Constitution was divided between the states and the people, with the federal government only having authority over territories ceded to them by the tribes. The state having the right, once admitted to the Union, to control all property not under tribal dominion, while the people were sovereign in the state. The theory of conquest ignores this issue and assumes that a monarchy still exists in a corporate form in the federal government despite the mandate of the American Revolution and the Constitution. This is another example of British imperial thought being accepted over constitutional theory in Indian affairs.

It is not conquest which Marshall turned to in his analysis of tribal powers and sovereignty in Worcester. It was to the terms of the treaties as well as the nature of legal existence. In McClanahan, the Court distinguishes between regulation of commerce and treaty powers; to the Court in Worcester these powers were one:

> This treaty [of Hopewell], thus explicitly recognizing the national character of the Cherokees, and their rights of self-government, thus guarantying their lands; assuming the duty of protection and of course, pledging the faith of the United States for that protection, has been frequently renewed and is now in full force.
>
> To the general pledge of protection has been added several specific pledges, deemed valuable by the Indians. Some of these restrain the citizens of the United States from encroachments on the Cherokee country, and provide for the punishment of intruders.
>
> From the commencement of our government Congress has passed act to regulate trade and intercourse with the Indians; which treat them as nations, respecting their rights, and manifest a firm purpose to afford that protection which the treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States. (At. p 556-7).

In analysis of section (c) of the Cohen formulation we shall return to this opinion of the Court. But for the present time, it illustrates that rather than conquest and the war powers, the treaty clause of the Constitution is the actual source of the legislative power of Congress. The commerce clause merely implements the protection which have been specifically pledged by the United States to the tribe in the treaties. That is the essence of treaty federalism.

The treaties allocated political power between the tribes and the federal government. It modified the tribes' and the Federal government's preexisting rights under international law in the same manner that the Constitution divided political power between the states and the federal government.

First, the states are bound together by a single contract. That contract is the Constitution. Similarly, the tribes are bound to the United States of America by hundreds of similar, but not identical, contracts. Those contracts are called treaties. But Indian treaties are no more treaties than the Constitution is a treaty among fifty sovereign states. Without a doubt, the tribes entered into the treaties as sovereign states and most of what we find in tribal treaties are familiar to students of international treaties and agreements: provision for domestic assistance, mutual defense, land cessions, and mutual extradition. What makes tribal treaties unique is the general and specific pledges which generally allocated political power between the parties. The general pledges of political power typically delegates from the tribe to the United States the power to manage all of its external (international) affairs. This is, of course, one of the powers given the United States by the states in the Constitution. It also imitates the arrangement struck in the royal charter of the original American colonies.

When an international agreement allocates power, it becomes more than a treaty. It becomes something we call a compact. Compacts in legal language are revocable only by mutual consent and imply a higher obligation on the parties than treaties. In this sense, the Constitution is a compact. By a unique twist of logic, modern law still holds that Indian treaties are international treaties only to the extent that they can be unilaterally modified or abrogated, but ignores the general and specific pledges which make the treaties also compacts.

Second, the allocation of powers in the Constitution differs from the allocation of powers in treaty federalism. To begin with, Indian treaties are a lot simpler than the Constitution and are to be read specifically, not generally. Strictly construed, they seem only to surrender the power of foreign affairs and delegated limited power to the federal government over their citizen conduct in tribal lands. The tribes retained or reserved all other political powers or sovereignty of international law which they did not expressly delegate to the federal government. It is clear that power is shared between the tribes and the United States just as it is shared between the states and the United States, and that the source of legislative power of the United States is a tribal delegation or grant in a treaty as enacted into law by the commerce clause. It is also clear that the tribes, probably even more than the states, value their reserved powers and view them as essential to maintaining cultural and spiritual freedoms through tribal government.

Although treaty federalism and constitutional federalism flow from different historical sources and documents, they reflect the same fundamental political ideals. The erosion of state federalism will eventually lead to the erosion of tribal federalism. Looked at from another point of view, the erosion of treaty federalism will lead to the erosion of constitutional federalism as well; the arguments raised in the states' assault on

Indian tribes will be turned on the states themselves to the loss of constitutional federalism. If the states succeed in persuading the people that the existence of jurisdiction spillover problems is a sufficient justification to abolish tribal borders, why is it not also sufficient to justify abolition of state borders?

c. These domestic powers are subject to qualification, limitations and even elimination by treaties or acts of Congress, but except as so modified, full powers of internal sovereignty remains vested in the tribes.

This proposition makes little sense when read with conquest rendering the tribes subject to the legislative power of the United States. Only the executive can enter into treaties; the treaties limit both external and internal power of the tribes--but tribes are subject to the legislative power of the United States?

It is not difficult to understand that only a consensual treaty can limit tribal powers or delegate those powers to the federal executive to execute through the commerce power. After all, the treaties as compacts are designed to accomplish this purpose. This was the significance of the passage from Worcester quoted above. Even Mr. Cohen acknowledged that the substantive provisions of all the act passed under the commerce clause by Congress fulfilled some obligations or "specific pledges of protections by the federal government" assumed by the United States in treaties with the Indian tribes.

As a matter of legislative history, until 1921 all federal legislation for "Indians" were in appropriation acts keyed by Congress to fulfilling specific treaty obligations. In the Snyder Act of 1921, Congress authorized general expenditures for Indian affairs under the urging of the Department of Interior and the B.I.S. This act concealed the relationship between treaties and act, and eventually led to the concept of "plenary power" of Congress being extended from states to tribes.

Under the newly acquired legislative power, Congress passed an act offering federal citizenship to tribal citizens in 1924 and acts to exploit tribal resources without the consent of the tribal citizens or tribal government. This freedom was abruptly halted in 1934 in the Indian Reorganization Act. The Indian Reorganization Act revitalized the ideas of tribal government and compact and recognized the reserved powers of the tribe. Rather than build on the traditional structures of tribal government, however, it created a social contract model of tribal government. It was more a compact than legislation: the United States consented to recognize all tribal powers not extinguished by the treaties, i.e. "all powers which may be exercised by such tribe or tribal council at the present time"; the Indians consented to the new form of tribal government in referenda called for that purpose. Also consistent with the critera of a political compact, the I.R.A. restructured the governing parties, establishes a permanent political relationship which flowed from the consent of the tribal members.

Slowly the idea, the totalitarian idea, of the plenary power of Congress and the "infringement test" of William v. Lee further hid the treaty clause as the source of legislative power over Indian tribes. Originally the plenary power doctrine applied between states and the federal government, but slowly it came to mean that Congress had absolute and exclusive political authority over tribes not even limited by the Constitution, except perhaps for the Fifth Amendment. A concept originally designed to protect tribes from the states became the greatest danger to tribal sovereignty and government. Under the plenary power doctrine, Congress began delegating its constitutional authority to the states: termination legislation, criminal and civil jurisdiction.

Likewise, the infringement test of William v. Lee supported the plenary power doctrine for it said that absent a federal statute the state government could extend jurisdiction over tribal reservations unless it infringed upon tribal government. Forgotton was that as long as the Indian Reorganization Act is valid, there is no absence of federal statute. While a tribe may not accept a referenda government, its reserved and inherent tribal powers are exclusive and acknowledged by the United States. Nevertheless, new lawyers on Indian reservations assumed that more federal statutes were necessary to protect tribal powers and looked to Congress and civil right statutes. As a result, general statutes of Congress as well as specific statutes of Congress dealing with Indian affairs are applied to tribal lands regardless of the terms of the treaties.

All of this legal process overlooked that without a treaty delegation, Congress has no authority to legislate on the internal affairs of a Indian tribe. The legacy of sovereignty which our forefathers handed to the future generation has been eroded in practice but not in legal theory.

In retrospect, it was a lack of faith and understanding of the tribal mind and soul by non-Indian attorneys which caused them to rely on myths rather than treaties in formulating the concepts of tribal sovereignty. Believing that our tribal ancestors were savage, they constructed theories out of English imperial history and asked the Court to validate them. There is a sad story in all this, I shall not comment upon at this time.

The sun is fading in the west and the sounds of the drums are beginning to echo across the lake: I have spent all this spring day writing this letter to you to clarify my responses to the papers you sent me. But, the pipe ceremony now fills my mind, so I must end my chat with you. Many things have not been said, so I send you an excerpt from our article The Betrayal: Oliphant v. Suquamish Tribe and the Hunting of the Snark (MINN L. REV) which elaborates on the nature of the court's versions of tribal sovereignty.

AFTERNOON SESSION

Dr. Alfonso Ortiz, Universty of New Mexico:

We are ready to begin the afternoon session, and I am more than happy to relinquish the podium immediately to Susan Power, Standing Rock Sioux tribal historian, and as she described herself during lunch, once a young activist and now a not-so-young activist but an activist now and forever nonetheless.

Susan Power:

Thank you. My heart is so warm and I'm warming my hands over the hopeful words of our Cheyenne/Chickasaw speaker this morning, and I know I will have more reason to feel the same after our speakers this afternoon. I was teasing Mr. Chino. Well, first of all, you can believe that one time this middle-aged woman standing in front of you was the youngest person with the National Congress of American Indians and I heard "Mr. Chino, Mr. Chino." His name was an important word then and if I relate all that he has accomplished, it's going to take me at least an hour or so. I will just tell you a little bit about him. Mr. Chino is a Mescalero Apache. He is President of the Mescalero Apache Tribe. He was the tribal chairman at twenty-nine years old, probably one of the youngest in the United States. He has served two terms as President of the National Congress of American Indians (NCIA). He has served two terms as President of the NTCA, which is National Tribal Chairmens Association. He is a delegate to the Inter-American Indian Congress in 1968. He addressed the World Peace Conference in 1978. He was the first Indian chairman of New Mexico Commission of Indian Affairs. He was the first Indian to take the Indian Preference Act to court. He is

responsible for a change in the law making Indians eligible for public housing. He is also one of our few Indians who has visited Russia, but need I say more. This is just a partial list of his accomplishments. It is indeed a great pleasure for me to introduce Mr. Chino.

Mr. Wendell Chino, President, Mescalero Apache Tribe:

Thank you very much. You know I look at Dr. Ortiz and John Redhouse and I admire their Indian braids; and I come up here and think about myself and I'm kind of getting smooth at the top. But you know my good wife tells me, "Wendell, you're going up to speak to those scholars and those attorneys, and that convinces me that much more. And she said to me, "Wendell, don't feel bad. The good Lord only made a few perfect heads. The rest he just put some hair on." Well, I'm going to read a couple of papers. The first paper I'm going to read is entitled "Indian Parable."

Recently a western newspaper printed a picture of a deserted farmhouse and a desolate sand-swept field and offered a prize for the best one-hundred word essay on the disasterous effects of land erosion. A bright Indian boy from Oklahoma won the trophy with a graphic description which we might compare by analogy to what the white men has done to his air, land and waters. The essay follows and I quote:

"Picture show white man crazy. Cut down trees. Make too big teepee. Plow hill. Water wash. Wind blow soil. Grass gone. Door gone. Squaw gone. Whole place gone to hell. No pig. No corn. No pony. Indian no plow land. Keep grass. Buffalo eat grass. Indian eat buffalo. Hide make plenty big teepee. Make mocassin. All time Indian eat. No work. No

hitchhike. No ask relief. No build dam. No give damn. White man heap crazy."

You know a teacher asked, "where is God?" and a bright young student answered, "in the bathroom." "Why is that?" the teacher asked. "All I know is that when my dad knocks on the bathroom door he always says, "My God, are you still in there?"

Here's a good one here: What's the name of a pig that knows karate? Pork chops. Well here's a good one about Father Kelly and Rabbi Levi. Father Kelly and Rabbi Levi were sitting opposite each other at a banquet where some delicious roast ham was served, and Father Kelly commented on its flavor. Presently he leaned forward and addressed his friend: "Rabbi Levi, when are you going to become liberal enough to eat ham?" Replied the Rabbi, "at your wedding, Father Kelly."

This is a wonderful opportunity for me to come here and share some thoughts with you on what I consider to be a very important subject. But I think that it is very important, before I get into my statement, let me ad-lib on certain things for a few minutes. We have to understand the present and the current situation of Indian people in the country today--particularly in the political arena because there are some very strange things happening. For instance, Senator Jackson prevailed upon the Supreme Court to review the famous Boldt Decision which confirmed the fishing rights of the Northwest Indians under treaty rights. And because certain sagamores of the Northwest society didn't believe in the treaty rights they prevailed upon Senator Jackson to carry the flag, use his senatorial influence

to ask the Supreme Court to review the Boldt Decision. And I'm here to tell you that if such a decision existed, if it pertained to the Blacks or it pertained to the Chicanos, you think the Supreme Court would review it? Certainly not. But just because it happens to affect about one million Native American people, the Supreme Court decides to review a case at the persuasion of a United States senator. You know, Doctor Billy Graham one time asked me a very important question: "Mr. Chino, what can I do to help the American Indian?" I said, "Doctor Graham, what percentage of the American society has subscribed to some religious principle or some religious faith?" And he said, "Mr. Chino, about sixty percent of the American people." That's over one hundred million Americans that believe in some kind of religious principle. So by the time you throw in the Knights of Columbus, the Rotarians, the Lions, the Civitans, probably the number then swells to seventy/eighty percent. So then the non-Indian societies, sixty/seventy/eighty percent subscribe to some important principle; whether it be something that has to do with business ethics or what have you. But the point that I was trying to make to Dr. Graham is this: In fact for that matter, I caught hold of Archbishop Sanchez not too long ago in Santa Fe and I threw the same question at him; and the point that I was trying to make to these important people is this: "Doctor Graham, if over half of the American population have some religious scrupules," and Archbishop Sanchez, "your people went up the Rio Grande pontificating to these Indians, the Pueblo Indians, about righteousness, justice, equality, brotherhood..." "Doctor Graham, Archbishop Sanchez, if this is a fact, then why do the Indians get such a rotten deal in a country that professes it, and subscribes to something that's honorable?"

So in order for you to appreciate tribal sovereignty, tribal identity, it is in this context that you must look at the Indian situation today. For it's more than theory, for it's more than legal position, for it touches at the very essence of what is important to you/what is important to us as Indian people. And that is the right to live into perpetuity. What lawyer thinks that when the Indians enter into treaties, or when those founding fathers wrote the Constitution, when they made reference to foreign nations and Indian tribes, did they not presuppose that Indians like foreign nations shall co-exist? And we're living at a time when people want to abrogate our treaties, and they think they can legislate us out of existence. You heard these attorneys and I'm speaking to you as an Indian from the boonies. But I happen to represent a group of people who lay claim to at one time, a land base that covered two and a half states; from the Gulf of Mexico to Tucson, Arizona. And that land base was reduced from a two and a half state land area to 460,000 acres. And I represent a group of people who were imprisoned by the United States Federal Government, one segment, one group, twenty-seven years. Then another group of my people were imprisoned at Fort Sumner, New Mexico, for eleven years. So when you represent this kind of group of people, you do not take their destiny, their heritage, their history for granted. Now I have traveled to distant places in the world to expound to anyone who wants to listen what I believe and how I feel about my Apache people and Indian people in general.

I appreciate the opportunity to share my ideas with you at the conference. The Newberry Library Center for the History of the American Indian is to be commended for making this forum available for a review and affirmation of this most important of Native American rights: tribal sovereignty.

Tribal sovereignty has its roots in the primeval development of Indian tribes within the area now known as the United States. This development has been an ongoing process since before the establishment of this country.

Long before the days of reservations and before the age of tribal constitutions any conflict between Indian and non-Indian usually resulted in the tribe moving further west or submitting to a superior force authority. Indian tribes of the eighteenth century and nineteenth century literally carried their sovereignty on their backs. This sovereignty, though unwritten and not cataloged, was steeped in tradition and ritual. For tribal sovereignty is not just the contact of Indian tribes with non-Indians, but is rooted in the traditions and folklore of intra-tribal relations. The tribal structure as to kinships and leadership were all part of the internal power of the tribe. This chain, often challenged and sometimes broken, is the backdrop of today's tribal sovereignty.

I mention this historical background because the foundation of today's tribal sovereignty must look to the past for its origin. Tribal sovereignty must be viewed as the authority of the tribe to allow traditional development to exist and also the power to exclude state interference. This recognition of tribal sovereignty has sometimes been classified as an inherent tribal sovereignty vested in all Indian tribes.

The Federal gvernment has recognized this inherent tribal sovereignty in the Constitution.[1] The Commerce Clause recognizes the existence, and I emphasize existence, of tribal authority. It should be noted that the Constitution does not create this authority, but only recognizes it.

Throughout my remarks today, you will see the rollercoaster treatment that tribal sovereignty has received in this country. Sometimes it has been viewed in the traditional sense of being inherent. At times, it has been viewed as a Federal preemption of control of Indian tribes to the exclusion of state goverments. At others, a combination of the two and unfortunately at times, its existence has been challenged. The up and down development of the theory of Indian tribal sovereignty may appear inconsistent to a non-Indian. To me, any inconsistency in reviewing tribal sovereignty over the last two centuries can be explained by the varying pressures and economic circumstances that have been developed by forces outside the tribal structure. I feel that Indian tribes have consistently attempted to maintain their tribal sovereignty within the compatible framework of the Federal Statutes and Regulations over this extensive period of time. I feel this way because if Indian tribes had not exerted and attempted to preserve their tribal sovereignty, they would not be here today. Sad examples of this have been shown when the tribal structure has been broken down and a state or states have been allowed to encroach upon the integrity of the tribes.

What is this tribal right that we classify as sovereignty? Of course, the term sovereignty is not applied only to Indian tribes, but is applied to any state which possesses a power that is the source of law, but which is not bound by law. Sovereignty, in essence, is power--pure and simple.[2] Application of the doctrine of sovereignty to the Indian tribes acknowledges simply and fundamentally that they are governments with the authority to manage their own affairs within their own territorial limits.[3] These references to sovereignty then reflect the reason tribal sovereignty has appeared to have an up and down existence during the last two centuries.

Indian tribes in exercising their sovereignty must integrate some with the supreme authority of the United States, and invariably rub against the sovereignty of the various states of the Union. This is why the Supreme Court of the United States has been called upon for many years to balance the tribal sovereignty, as recognized under the supreme authority of the United States, against the states who have attemped to encroach on this basic Indian right.

Before commenting on the various important decisions of the Supreme Court, I would like to turn once again to further attempt to define what tribal sovereignty is. Many of you have heard the Bill of Rights of the Constitution referred to as a "bundle of rights". This means that the ten original amendments to the Constitution together form a basis of human protection and recognition of the individual rights of each citizen. By calling them a bundle of rights, it is implied that if one of these rights were removed, the strength of the Bill of Rights would be weakened. Tribal sovereignty is also a bundle of rights. As I have alluded to earlier, it has within this bundle traditions that span many, many generations. Tribal sovereignty is the present-day cloak that protects Indian ritual, folklore, art and traditions. This is one part of the bundle of rights that we classify as tribal sovereignty. Tribal sovereignty also includes the authority and control of matters within the reservation boundaries. This means jurisdictional power to control peoples, Indian and non-Indian, who enter within the sphere of tribal jurisdiction. Also within this bundle is the right to control resources of the individual tribes. An Indian tribe must have the authority and right to control its own internal resources so that it can flex its economic muscles with resulting benefits to the whole tribe.

I would like to emphasize this economic control as a part of the bundle of rights we call tribal sovereignty. The Congress has recognized this important franchise. One need only to turn to legislation passed by the Congress to recognize the reaffirmation of the need for economic development by tribes to continue to be dependent sovereigns of the Federal government. 25 U.S.C. 470 stresses this economic development by setting up as its purpose the promoting of economic development by the tribes. Section 470 sets up a means by which the Federal government assists the Indian tribes in economic growth. It must be emphasized in reviewing this bundle of rights that same franchise has been protected by the Federal government and has been done to the exclusion of the states. A tribe that compromises its resources, whether it be its people or whether it be its land and minerals, compromises its tribal authority.

Another part of the bundle of rights that we classify as tribal sovereignty involves the right to self-government. This may appear to be obvious from the other rights given to tribes, but it cannot be over-emphasized. It must be considered a separate stick within the bundle that allows for development of tribal integrity. Any interference with the right to self-government is an interference with the most basic foundation of tribal sovereignty.

Like the Bill of Rights, the removal of any one stick from this bundle of tribal sovereignty rights endangers all aspects of tribal sovereignty.

In any review of the sovereignty of Indian tribes, Worcester v. Georgia[4] is truly a landmark decision. Worcester is a very interesting opinion to

review. We from time to time see short sections quoted which reflect an affirmation of inherent tribal sovereignty. Yet sometimes this case should be read in its entirety, for it points to the historical development of tribal sovereignty and acknowledges its existence prior to the Constitution. The historical development is important because all future tribal sovereignty cases inevitably return to Worcester to either restrict or confirm this inherent right. It should also be recalled in Worcester that this was the attempt of a non-Indian to challenge the criminal authority of the State of Georgia. It was not the attempt by an Indian or an Indian tribe to battle a state as to protection of sovereign rights, but rather was a jurisdictional battle as to whether or not Georgia's criminal statutes would be applied within Indian country. The Court held that the assertion of jurisdiction by the state over the Cherokee Nation was void. The extensive opinion also confirms that tribal sovereignty is inherent in the first instance, and only avows the Doctrine of Federal Preemption as a secondary reason. The direct, straight language of Chief Justice Marshall is worth noting, when he says:

> The Cherokee Nation.....is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the Acts of Congress. The whole intercourse between the United States and this Nation, is, by our Constitution and laws, vested in the government of the United States.[5]

I feel that Marshall holds tribal sovereignty to be an inherent characteristic of Indian tribes because of the long historical review the Chief Justice made. Some have determined that Worcester stands first for the proposition of preemption and in the second instance, for recognition of inherent tribal rights. Others feel that this is a blending of the two rationales for tribal sovereignty. In relationships between the tribe and the Federal government, I do not feel that the distinction is important. This is backed up by over 150 years of federal control which has consistently been asserted in the areas of crimes, liquor laws, economic development and other areas that point to a working relationship between the tribes and the Federal Government. However, I do feel the distinction is very important in dealings between tribes and states. In dealings between Indian tribes and the various states, Worcester says that the tribe, through its inherent rights, can control activities within its reservation boundaries. The reference to preemption deals with the Federal Government and tribal relationships, and only in a secondary sense does it involve relationships between the tribe and the state. For instance, preemption becomes a factor only when a state asserts control. Then, following the rationale of Worcester, the Federal government would say not to the state in its effort to control tribal relations. It would say no simply because the Federal government has established a program which leaves little room for the state to assert any authority.

The pronouncement of Worcester is simple. Indian tribes are dependent sovereigns located within the United States of America. They have a special relationship to the United States of America. This relationship precludes any interference by the state government, unless the Federal government

specifically authorizes that state interference. In this day and time, one could also add that since the implementing of the Indian Civil Rights Act, that the approval of the individual Indian or Indian tribes is also necessary.

Even after Worcester, it was necessary for tribes to continue to establish an arena in which they could preserve their tribal customs and ways, while raising the curtain on internal development. This internal development must be encouraged for tribes to survive. Indian tribal sovereignty is the very basis of Indian life and the cornerstone of its future existence. This internal development and tribal integrity cannot exist unless this power to assert control over tribal areas is not reaffirmed each and every day. I feel this statement is important in light of cases that followed Worcester and in light of present-day Indian developments.

Later in the nineteenth century, the Supreme Court followed a view that stressed the power of Congress to limit Indian tribal government. The decision in United States vs. Kagama[6] recognized the authority of the Congress to expand the scope of its power over Indian tribes, and did not emphasize the Constitutional recognition of inherent tribal powers. Yet the Supreme Court turned around in Talton vs. Mayes[7] and affirmed that inherent powers of tribal self-government are subject to the supreme authority of the Congess and a tribe's power to govern cannot be considered to have been created by the Constitution or by any act of the Federal government. In essence, there has been a limitation placed on the authority of these dependent nations, but that limitation does not remove their power to govern within their territorial boundaries. A review of these cases and other cases at the turn of the century, left tribal sovereignty on the pogo

stick of how best to discern the source of that tribal sovereignty; for the source is important to reflect the actual extent of that control. Please do feel by this statement that I am going to present to you later cases that solidify and clarify the issue of Indian tribal sovereignty. In the eye of the non-Indian, tribal sovereignty could probably be best described as a fluid in a container with that container continuing to change its shape. To the Indian, tribal sovereignty has always been a rock, indomitable and uncompromising.

What I am really saying about the Supreme Court decisions at the turn of the century is that there have been many changes in the view of tribal sovereignty since that date which relate to the relations between Indian tribes and the Federal government.

Most sovereignty cases of this century have come in the last thirty years. I feel that the cases that have developed in the last thirty years are based on the following factors: (a) The increased population has more contact with Indian lands and placed greater pressure on Indian resources and Indian peoples; (b) the Indian Reorganization Act, though passed nearly fifty years ago, has really reached its full implementation in the last thirty years; (c) The preparation, passing and implementing of the Indian Civil Rights Act; (d) a stronger recognition and and emphasizing of treaty rights. These factors point very strongly to a recognition of the inherent rights of Indian tribes.

With the foregoing in mind. Williams vs. Lee[8] approaches the question of the State of Arizona asserting its jurisdiction. The Supreme Court

reviewed actions of Congress to see whether Congress had granted the state court jurisdiction. The Supreme Court held that without such an affirmative grant, the Court will review whether or not the attempt by the state to assert its jurisdiction interferes with tribal self-government. In Williams, the Court intertwined the doctrines of inherent tribal sovereignty and Federal preemption.

In the early 1970's jurisdictional questions once again were raised in the decisions in McClanahan vs. Arizona State Tax Commission and Mescalero Apache Tribe vs. Jones.[9] Those cases were signaled as partial victories for Indian tribes, but a dispassionate look at these decisions raises some strong concerns for tribal sovereignty. In the Mescalero decision, the Mescalero Apache Tribe felt comfortable with the dialogue as spelled out by the Court. This is because the Court looked with particularity at our treaty and specific Federal statutes. We have always felt that if our treaty is brought into play in any issue that it gives us a leg up on the argument that tribal sovereignty is inherent in nature. This, we felt, left the Mescalero Apache Tribe in a strong position, but is could possibly be interpreted as a weakening of tribal sovereigny where state enabling legislation was not as emphatic as in New Mexico, the particular tribe did not have a treaty or other manifestations, or tribal/federal controls were weak which could lead to a conclusion that tribal sovereignty had been eroded, either voluntarily or involuntarily.

I feel that this is why the Court, in cases that have followed, such as Bryan vs. Itasca County,[10] has analyzed whether or not the Indian tribe is actually exercising its self-government right. This is why I emphasize

that tribal sovereignty must be viewed as a bundle of rights. Each facet of tribal sovereignty must be jealously protected so that the whole that we consider tribal sovereignty is preserved.

I feel one of the strongest cases for tribal sovereignty to be handed down by the Supreme Court in the last few years is United States vs. Mazuri.[11] Possibly, a few of you have reviewed that decision, but I do feel that the facts are important to review, because they show the extent of tribal sovereignty as recognized by the United States Supreme Court. You may recall in that case the defendants were non-Indians who operated a bar on privately-owned land location within the boundaries of an Indian reservation. The Defendants were convicted of unauthorized introduction of alcoholic beverages into Indian country. A very important fact is that the State of Wyoming had granted the defendants a license, but because of internal and social relations of tribal life, the Wind River Tribe disallowed the license. The United States Supreme Court in this decision acknowledged the power of the Indian tribe to control the sale of alcoholic beverages within the boundaries of the reservation, even though the lands were held in fee by non-Indians, and even though the persons regulated were non-Indians. The Court recognized the independent authority of the Wind River Tribes over the Defendants. That recognition language is closely followed by the following statement: "Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory," Worcester vs. Georgia, 6 Pet. 515, 557, 8 L.Ed. 483 (1832); They are a "separate people" possessing "the power of regulating their internal and social relations..."[12] By recognizing first the independent characteristics of control in the Wind River Tribes

and then referring to the language of Worcester, the Supreme Court is once again affirming the inherent basis of tribal sovereignty. That basis which has its roots in the long history of Indian tribal development which includes not only laws, but also includes customs and traditions.

In the October, 1977 term, the Supreme Court reviewed several cases involving Indian sovereignty. In Iliphant vs. Suquamish Indian Tribe,[13] the tribe attempted to extend its criminal jurisdiction over non-Indians. The tribe asserted same on its retained, inherent power to govern on its retained, inherent power to govern on its reservation. While conceding the Indian tribes have retained elements of governmental authority, the Court held that an Indian tribal government cannot exercise criminal jurisdiction over non-Indians. This would by reason of this decision, hold that tribes were limited in the exercise of their local powers of self-government. They are limited to dealing with non-Indians on a basis that has been approved by Congressional action.

Concerns that were raised by the Oliphant decision could be salved by the decision in United States vs. Wheeler.[14] The Supreme Court was able to interweave the doctrine of inherent tribal sovereignty with Congressional control, when it stated:

> The sovereignty that the Indian tribes retained is of a unique and limited character. It exists only at the sufference of Congress and is subject to complete defeasance. But until Congress acts, the tribes retained their existing sovereign powers. In some, Indian tribes still possess those aspects of sovereignty not withdrawn by

treaty or statute, nor by implication as a necessary result of their dependent status.[15]

That appears to be very strong language confirming the inherent right to tribal sovereignty. Such an affirmation insures the future integrity of tribal self-government, tribal development, and the protection of Indian customs and traditions.

Another case decided last term, Santa Clara Pueblo vs. Martinez [16] seems to affirm that tribes are sovereign entities fully capable of governing themselves. These three recent decision seem to strongly affirm the principal of Indian tribal sovereignty. This is a confirmation by the Supreme Court that it supports the internal Indian tribal self-government principle. They have blended this right to tribal self-government with a recognition of the unique characteristics of Indian tribes as dependent sovereigns existing coextensively with the Federal government. These recent decisions seem to the Worcester decision and state that these powers of self-government are recognized by the United States, though having their roots inherently based in the history of the first Americans.

Where does tribal sovereignty stand today? Based on the recent decisions, it has again reached an acceptable level of recognition, because it allows tribal governments to exercise their inherent powers within their territorial borders. It also can be exercised to nourish the economic and social needs of Indian people. The "new sovereignty" reaffirms the strong ties between the Federal government and the Indian tribes. In essence, it gives the Indian tribes the continued opportunity to revitalize their never-ending experiment with self-determination.

FOOTNOTES

1. U.S. Constitution, Article II, Section 2, clause 2.
2. Werhan, "The Sovereignty of Indian Tribes: A reaffirmation and Strengthening in the 1970's", Notre Dame Lawyer, October, 1978.
3. 1. Am. Indian Policy Rev. Comm'n Final Rep. 99-100 (1977).
4. Worcester vs. Georgia, 31 U.S. (6 Pet.) 515 (1832).
5. Id. at 561.
6. United States vs. Kagama, 118 U.S. 375 (1886).
7. Talton vs. Mayes, 163 U.S. 376 (1896).
8. Williams vs. Lee, 358 U.S. 217 (1959).
9. McClanahan vs. Arizona State Tax Commission, 411 U.S. 164 (1973); Mescalero Apache Tribe vs. Jones, 411 U.S. 145 (1973).
10. Bryan vs. Itasca Country, 426 U.S. 373 (1976).
11. United States vs. Mazuri, 419 U.S. 544 (1975).
12. Id. at 556-557.
13. Oliphant vs. Suquamish Indian Tribe, 98 S.C. 1011 (1978).
14. United States vs. Wheeler, 98 S.Ct. 1079 (1978).
15. Id. at 1086.
16. Santa Clara Pueblo vs. Martinez, 98 S.Ct. 1670 (1978).

Susan Power:

Before I introduce the next speaker I would like to remind you all that after the conclusion of the next speaker's paper, which will be short because he does welcome a question/answer period, we will have a coffee break and then we have a most interesting summation of the conference by our conference chairman, Professor Ortiz (Tewa). Now, I'll introduce the next speaker who is John Redhouse (Navajo) from Farmington, New Mexico. He is a former Associate Director of the National Indian Youth Council. For the past seven years he has worked on issues involving sovereignty and resources. When I mentioned to him this must mean you are an activist he shyly said, "yes." I reminded him to always speak out loudly, "Yes I am an activist," because that means you are aware of what is going on in Indian countries and that you do care. His talk will be on the preservation of tribal culture and identity. Please welcome John Redhouse.

Mr. John Redhouse:

Thank you. I don't have any jokes, but I'll try to make this short and very sweet. Sovereignty, Indian sovereignty in particular has become the catch-all for everything that is happening, good and bad, in the Indian country. And everyone including Indian people are spending a lot of time attempting to define it as it legally relates to them. Sovereignty, like our culture, is dicated by the nature of our homelands. It determines whether we live in hogans, pueblos, teepees, birch houses or igloos. And it also determines whether we are fishermen, hunters, or farmers. And it may seem that the distinction was for the past, but it holds true, very true more so today. Today our future, our sovereignty, and our cultural lifestyles are under a very real threat of extinction from the U.S. courts,

the U.S. Congress, state, county and local politicians. And this threat as the result of nature has had to provide the multi-national corporations in the way of mineral resources; coal, uranium and water. Indian sovereignty is currently being commonly defined as what the U.S. Courts say it is. We can tax but we can't tax. We can fish but we can't fish. We have the rights to certain lands but we can also be charged with trespass on those lands. We have the right to govern ourselves so long as it doesn't violate any state or federal law. And we have all the rights guaranteed us in our treaties for as long as the grass shall grow and the rivers shall flow. But those grasses are being strip-mined and the rivers are being dammed.

The most damaging piece of legislation passed by Congress that disputed Indian sovereignty was the 1924 Citizenship Act which made us citizens of our own country. It didn't offer any advantages. It merely allowed outside jurisdictions and access to dilute the powers of tribal governments over their people and lands.

Then to compound the erosion of Indian sovereignty, the 1934 Indian Reorganization Act was put upon us by apparent well-meaning liberals. It made us restructure our tribal governments, patterned after non-Indian governments and allegedly more representative. But the real purpose for the Reorganization Act was to provide a legitimate governmental body that could make deals, supposedly for our benefit, and that has proved to be very detrimental to us. It allowed acres of our land, water and minerals to be signed away without adequate discussion from the tribal members who most assuredly were directly affected by such decisions. The Indian Reorganization Act was the first in many laws that legalized theft of our human and natural resources.

Since the U.S. Supreme Court proclaimed the Winters Doctrine in 1906, guaranteeing Indian tribes all the water they needed for subsistence, ranchers and farmers, city and county legislators, corporate lawyers and members of Congress have attempted to overturn and abolish that decision. Granted, we hadn't had the financial resources to fully develop our water uses, but that should not be the determining factor to deny us the ultimate lifeblood for our survival. And the trend today is that industry has precedent over humans: strip mines over food. And Indian tribes have very little power to protect their water resources, as evident by the number of law suits currently in the courts. Tribes are being forced to sue to protect their water rights from the government and corporations, states and local people. If there was tribal sovereignty the tribes wouldn't be in the courts. The tribes would by issuing water permits to non-Indian users. Since the 1934 Reorganization Act, the Federal government and the corporations have had almost a carte-blanche to our resources, primarily because it is their contention that the five-man tribal council or even just the tribal chairman is the ultimate authoritative power over a 700 member tribe. And unfortunately it has led some of our tribal leaders to also think that way. But the people still have their say, even if they have to take certain unpleasant actions such as demonstrations against certain council decisions or even filing law suits in tribal courts to prevent destruction of their homelands.

Because of our present tribal governmental structure, many leases were signed without adequate discussion from the tribal members. On the Navajo Reservation, many acres of our land were leased in the 1950s and 1960s for a variety of purposes. There is even some dispute that my tribe relinquished

the Winter's Right to the San Juan River in return for an agriculture project already guaranteed in our treaty of 1868. As a result, many Navajo people are witnessing the destructing of their land by mining companies, lands that were leased without their knowledge or permission, and by tribal government miles from their location. Further, the Bureau of Indian Affairs is guilty of usurping tribal governmental powers by approving leases, some without tribal knowledge which is justified as being "economically feasible" for the tribe.

But the altering of a peoples' lifestyles without the approval of the affected people strikes at the core of sovereignty. If one cannot direct one's life's direction, then one is a robot. Indian sovereignty has become a controversial issue when Indian people found out that they actually had certain powers over their people and resources, basic jurisdictional powers to protect everything within their borders. And it wasn't too much that the tribes did have power to control their destiny that posed a threat to the powers that be. But it was the attitude of sovereignty that was spreading throughout the country's tribes that was viewed as the real threat. With such a prevailing attitude, the tribes will no longer be easy pickings hence; big corporations have had something to put a stop to it with the Federal government's cooperation. Enter the backlash and its legislation: Congressional legislation designed equal citizens, to abrogate our treaties, put our lands on the tax flows, and to make our tribal culture a hobby. Throughout this country no race of human beings can lose their true racial identity through the passage of a legal document. But we Indian people have that distinction and where is tribal sovereignty if it can happen? The whole backlash movement was supported by business interests which

essentially began in the Northwest, with commercial fishing interests opposing the so-called infamous Boldt Decision. Judge Boldt merely upheld treaty law--treaties that supercede all the laws of this country. And yet, he was degraded by his own white people for respecting this country's law. Then the ranching and farming interests were faced with paying a fair price for the Indian lands they leased, thereby cutting into their profits. Standing townships and housing developments, industrial development and mining interests viewed the upsurge of the independent attitude described as Indian sovereignty as a threat to their checkbooks. However, Indian sovereignty as a preservation of our culture will never be realized until this country's corporate powers and the Federal government quit trying to ruin us in their pursuit for profits. Their desire to exploit all our natural resources will not only destroy us as a people but will also destroy the rest of the people. There doesen't seem to be any end to their madness, but it can be halted if Indian people really truly exert their sovereign rights expecially to say no to any uncontrolled industrial development of their lands, because their lands and the right to govern them is about all that the Indian people have left to build a future on.

Wilcomb Washburn:

Are you saying that Mr. McDonald who is chairman of the Navajo Tribe is unrepresentive of the people o_ the tribal government is illegitimate?

Redhouse:

OK. There are many Navajo people that feel that he is both; not necessarily because of Peter McDonald, but also other chairmen that have been running tribal government for a long time. They see the Navajo Tribal Government

as being largely illegitimate. It's not your typical IRA 1934 tribal government. It was formed about eleven years before that and the reason it was formed was to basically sell or lease lands to outside oil corporations. The first tribal council was formed in, I believe, in the early 1920s, and it basically hand-picked by the Secretary of the Interior to deal away those lands and resources to outside oil corporations. The reason they had to this is because they could not get a three-fourths consent on the land that was to be ceded and this was specifically laid out in the Navajo Treaty of 1868. It's this kind of pressure that begat the first tribal government and it's something that came from the outside; it was a response to corporations interests of mineral resources on the Navajo Reservation and it was not something that was developed internally. In fact, it had the opposite effect. The Navajo people were basically a political confederation at that time, and the formation of a centralized tribal government by outside pressures has had a disastrous effect in many of the districts on the Navajo Reservation.

Washburn:

How do you get rid of a government like that today? Do you believe in the voting process to throw him out or do you believe in revolutionary movement to just destroy the government? What's the solution today?

Redhouse:

Well I think that the solution has to be internal. It can't come from the outside. There are many people on the Navajo Reservation who are pushing for reform and change within that system. I don't think that the

solution is for revolution or anything like that. There are some very constructive and positive changes of force that are taking place on the Navajo Reservation. But that's where it had its roots.

Washburn:

Do you accept the existing structures today and simply try to get a majority of the vote to throw him out or do you destroy the structure?

Redhouse:

Right now there are a lot of people on the Navajo Reservation that feel that the structure is unacceptable. Even if one were to take over tribal government, there's a larger colonial picture that enters into the whole thing, and that is the colonial relationship that tribal governments--all tribal governments-have with the Bureau of Indian Affairs. The Secretary of the Interior can give a yes/no veto to any kind of decision that the tribal government makes, and they feel that the enemy is not necessarily tribal government but the whole colonial picture.-- these powerful outside forces that are there. And when I say outside forces, I am talking about the Federal government and industry.

Susan Power:

John, could I ask you a question? I know that Exxon Corporation alone has a fourhundred thousand acre lease on the Navajo Nation and I know that Kerr-McGee, Anaconda, General Electric and so on and so forth do. Now does anyone hold a larger lease than Exxon?

Redhouse:

I don't believe so; not on any Indian lands. That's bigger than most Indian reservations, and it's not only for exploration but uranium mining and milling as well. In fact, it's automatically convertible into development once the exploration and the prospecting phase is over. I might also add that the central Navajo Tribal Government approved the lease over the expressed wishes of the five communities that were living in that affected area. In other words, the majority of the people that were living in the land to-be-leased opposed it but the tribal government went ahead and approved it. This is one of just many clashes between local grass-roots people and the central tribal government.

Sondra Jones:

What happens to that lease? Where does it go?

Redhouse:

Much of it goes to run tribal government, and some of it goes to accommodate the government; in other words to provide the collective physical intrastructure that you need for that kind of primary development, such as roads and sewers and services like that. There's a big issue as to whether mineral taxation should take place, in addition to the royalties. Taxation would basically run the day-to-day operations of tribal government and the royalties could be used to invest in the future once the minerals are gone.

Sondra Jones:

I frequently run across this from the grass-roots members of the Indian community that people who are in the tribal council do not represent them.

That's why there's such a low turn-out to vote because they figure, why should they, because the people don't represent them anyway. And yet the governments--they're putting them in a position where they can sign away anything they want to. How can you change this though? What possible kind of a political organization could you make that would handle adequately the needs of everybody in the tribes--all 100,000 Navajo or all 1,500 Utes, that it's going to be representing without having a small group somewhere that is going to function as the acting representative of everybody else? People are constantly complaining, "well, we've only got five people up here to represent us and they don't know what I want." But you can't have all 1,500 people or 150,000 doing something. Do you have referendums for everything, or what kind of solution do you see?

Redhouse:

That's really a difficult questions. You know, it's partly true on the Navajo Reservation; I think you can really see it on the Hopi Reservation where the majority of the tribal members refuse to participate in the tribal election process because they don't believe in it and they see that as just another way of surrendering their national sovereignty. The Hopi traditionalists make up about 87% of the beliefs of the Hopi that live on the reservation. In other words, the tribal government can only command the allegiance of 13% of those folks and this is using their own statistics. And the reason that you have this silent protest, one of non-participation--that kind of thing--is because they have a different concept of sovereignty. They certainly have the numbers to take over tribal government and they feel that if they do take over tribal government that they'll just be succumbing to a larger power or a greater sovereign.

So they continue to be in a position where they continue to be screwed by decisions that are made by this illegitimate tribal government. The Hopi traditionalists don't like what has been happening to Black Mesa, which is a sacred mountain. Tribal government made a decision there to go ahead and allow strip mining at this sacred mountain. If they had been a true tribal government, it wouldn't have happened. But, this is the kind of dilemma that is facing a lot of people who simply won't accept IRA-type governments because they have certain principles and certain concepts of sovereignty that make that very difficult. I see this as being kind of the trend in Indian country. In the 60's and even the early 70's, it was pretty fashionable to attack the BIA and the Public Health Service (PHS) for being the agents of colonialism and so forth. But as we moved into the late 1970's, and perhaps as we move into the 1980's, we have tribal members who are questioning their own tribal government and they aren't your disciples of Jack Cunningham or Lloyd Meads, whatsoever. They just have some very honest criticisms of the way tribal government is set up: the structure and its function, its origins and so forth. And most of that, as I see it, is revolving around the role of tribal government in either selling or leasing lands or resources on their lands. I see this particularly true up on Pine Ridge and certainly on Hopi and it is heading towards Navajo right now.

Washburn:

Where do you get that figure about 87% of Hopi being traditionalist and 13% supporting the tribal government?

Redhouse:

This stems from Caleb Johnson based on a number of studies for the Hopi traditionalists. Caleb Johnson is the representative and spokesperson for the traditional Hopis.

Washburn:

Have the studies been published anywhere?

Redhouse:

I don't think they've been published. They've been publicized and as far as I know, they've been undisputed by the Hopi Tribal Administration.

Washburn:

Isn't is true that this was one of the points made during the Hopi-Navajo land dispute? That it is a fact the Hopi Tribal Government does not represent the people for this very reason and the Navajos were saying that they did not have the right to represent the people as they claim to? Isn't this one of the things they brought to court?

Redhouse

I'm not familiar with that one. I know that in talking and listening to a lot of the Navajos and Hopis in the so-called disputed area, the feeling is that both of those tribal governments are illegitimate and that they've disagreed upon everything except one thing, and that is to allow this coal exploration company called Dresser Corporation out of Houston, Texas, to conduct explorations for coal resources out in the disputed land, and there's twenty-five billion tons of coal out there, and it's the money from coal that really makes those governments function. Twenty-five billion tons

times, say twenty dollars a ton, you're talking about billions of dollars. And they feel that the dispute really is not what lies on top of the surface as much as it is what lies under the surface. It's that coal and that uranium that those two tribal governments are willing to sell out and cause this mass relocation. That is one of the main things that those folks have continually struck home. And they also say that there's no real argument with them because there are a lot of intermarriages, they use each others' medicine men and they use each others' sacred areas for pilgrimages and that kind of thing.

Walter Williams:

There seems to be a bit of a duality in what's been said today: For the purpose of teaching of Indian history when dealing with the twentieth century, to what extent are you using, for example, the various more recent Supreme Court decisions that Mr. Chino talked about? Do you respond to that as a direction that you're pleased with or do you think that harkening back to Worcester--to that decision--is necessarily the best direction? Should it be more back not to a domestic kind of nation status but one more back directly to the treaties as independent nations? Or, in other words, do you conceive of these recent Supreme Court decisions as positively as Mr. Chino seems to feel?

Redhouse:

It depends on which Supreme Court decisions you are talking about. Certainly Oliphant was terrible. It not only made a disaster for criminal jurisdiction but also left the door wide open for other forms of jurisdiction: civil, taxing, regulatory, those kind of things. I think that this is a dangerous

foot in the door. The Wheeler Decision: I have mixed feelings about that. Right now I don't see any real trend going on. The whole U.S. Supreme Court has been called into question right now, and this I think may be good for Indian tribes today.

James Young, (Hidatsa/Arikara) U.C.L.A., editor American Indian Culture and Research Journal:

..... You expressed the idea that about 30 to 40 percent of the Navajo population are entirely removed from the political process of the Navajo economy. If the Navajo Government should fall now, or even if the United States Government should fall, you contend that they would still survive in various ways. How does this large population figure equate with your idea that a large number of Navajo people are dissatisfied with the current government?

Redhouse:

I guess they feel that the tribal government does not make them a sovereign people.

Young:

That 30 to 40 percent of the people-you can't count them as expressions or feelings of either positiveness or negativism towards the current goverment. So my question is, where do you get your large number of grass-roots people expressing current dissatisfaction with the current MacDonald government?

Redhouse:

I didn't say that there was a majority on the Navajo Reservation that simply would not participate, but that there is a very large number. It

admittedly is a vocal number but I would say that between 30 and 40 percent simply won't have anything to do with tribal government as it is set up right now. Did that answer your question? Do you want to rephrase it?

Young:

Yes, that non-participation in tribal government, that large number does not mean that they express a desire either way. It could be passive silence. To me that doesn't express either approval or disapproval of the government. So what I'm saying is that a large number is not a clear indicator of the Navajo population's opinion.

Redhouse:

In talking and listening to the people that have said the reasons why they don't participate in it, this leads me back to the statement that I made. This is a form of silent protest--the fact that they just won't have anything to do with tribal elections or refuse any kind of services given out by the tribal government. And I think that ten years ago you wouldn't have heard people saying that or admitting that that was the reason why they refused to participate. And this phenomenon is on the rise and the situation is a lot more blatant out at Hopi and on Pine Ridge right now. There's a growing movement also towards this passive resistance. That's why you have the Lakota Treaty Council which is representative of a lot of people now, young and old.

Dr. Roy E. Cameron, Director, Energy Resource Training and Development, Argonne National Laboratory:

Is there really that much land which is being disturbed by energy/resource development--say the coal by Peabody Coal Company of Black Mesa and the Kayenta mines? And, also isn't this land being reclaimed and put back let's say into maybe greater land use? I mean, there wasn't that much being used before anyway, was there? For sheep or other purposes?

Redhouse:

Well, out on the Navajo Reservation, it's mostly used for livestock grazing and there's some agriculture for subsistence. Right now, there hasn't been any land that we can say that has been truly reclaimed. There's a lot of land that's been "allegedly" reclaimed. They put a lot of chemical fertilizer and they saturate it with water and so forth and they say they put vegetation on there. But you take away those alien elements and the land simply won't survive without that kind of outside subsidy. We have a lawsuit called NIYC vs. Cecil Andrus that was filed last year that says that there hasn't been any reclaimed land in the western United States--land that has been strip-mined. Utah International, which operates the largest coal strip mine in the western hemisphere is located on the Navajo Reservation. To date, they have not been able to say that they have reclaimed the land. They've regraded some and they've done some kind of facade work, but it cannot be returned to its original productivity for a long, long time. And it's this land where we really haven't seen anything yet insofar as mineral development upon Indian land. In the 1980s and 1990s it's really going to come down to this since Indian lands contain 55% of the nation's uranium and 1/3 of the nation's low-sulphur strippable coal. And we think

that we saw a lot in the '60s and the '70s. Uranium alone, uranium production on Indian land alone in the next 15 to 20 years, is going to increase by a factor of 10. And Indian lands already have the largest uranium strip mine in the world. They have the largest uranium mill in the country and there are two of the world's largest uranium mine shafts that are being sunk into sacred Navajo and Pueblo mountains. We have all these things, developments of such massive scale; and, with production to increase by a factor of 5 to 10, it's going to amount to a lot of land.

Cameron:

But won't the Office of Surface Mines be careful with this in the future to assure that this is reclaimed, if it is?

Redhouse:

Yes, that's one of the things the NIYC suit is about, because the Surface Mining Act of 1977 gave a very strict definition of what reclamation should be. It's based on some very strict performance standards and the company that the NIYC is suing has not been able to submit an acceptable mining and reclamation plan. It's been rejected twice. This is the first major test of that act right now, and some of the tribal governments like Northern Cheyenne and Crow and Navajo are in the process of taking over the enforcement authority of those lands. In fact, even preempting some of the state regulatory court decisions that had been used up until this act was passed.

Jennings:

Mr. Redhouse, I'm a little baffled by the direction you want to go. On the one hand, you seem to be very well informed about these natural resource problems and you certainly want to get some kind of control over them and in the hands of your people. On the other hand, you say, apparently with approval, that a majority of your people are withdrawing from having any kind of association with the governmental organization that has the power to control. Now, if you withdraw, how can you get the control?

Redhouse:

It's not so much the position that I'm advocating as it is the position of the people that I've been talking and listening and working with over the past seven years, and I'm saying that this is a trend that is growing and it's a trend that will definitely be very dominant, I feel, in the 1980s, and it's going to be around the issues of lands and minerals and other resources.

Jennings:

What would you advocate?

Redhouse:

I'm not in a position to tell Indian people what to do.

Jennings:

You're in a better position than I am.

Redhouse:

I don't think you ought to be telling Indian people what to do anyway. I'm just saying that I'm giving a forum for what they're thinking and what they're saying and what they're doing and that these are issues that are coming to the surface as we move into the 1980s. And there's new thinking, there's new activism that is being developed based on that thinking--based on the conceptualizing that those people are doing. There are going to be different issues within the whole tribal sovereignty thing that are coming to the surface.

Jennings:

Again they persist in taking that one little word, and say they are practicing activism, but activism moving towards withdrawal? It seems like a funny kind of activism.

Redhouse:

They're moving back to what they feel is a traditional way of dealing with things. This is what the Lakota Treaty Council is doing for example. They're withdrawing into a way that used to work for them before these outside pressures, before the 1934 IRA government imposed this tribal government on them. And they're moving towards things like international law or bringing an international forum to look at the whole treaty question for example. It's not like they're going back and not standing-up for something. They're moving to a different level, mostly in the international arena right now.

Jacqueline Peterson, Atlas of Great Lakes Indian History, Newberry Library: I'd like to probe a little bit further into this issue. Isn't it true that this sort of passive withdrawal or passive negative criticism is in itself a pretty traditional way to deal with an inability to reach consensus? I guess what I want to know is whether or not you think that this rising movement back toward passive traditionalism will result in enough anger in people for them to begin to involve themselves in real adversary politics? What will tribes do, scrap the IRA governments or will a movement by traditionals ultimately attempt to take over presently structured governments?

Redhouse:

It could go either way. I don't know if it's really passive withdrawal or not. I've seen it as just flat-out rejection of those institutions that they perceive as alien as the BIA or PHS or whatever.

Susan Power:

Excuse me, but before you answer another question, could I put some food for thought to the audience before me? I'm going to just read off some countries that co-exist within or beside larger dominant countries. Bear with me for just a minute. Andora, a hundred and eighty square miles. These are sovereign nations that are economically stable, no welfare, and recognized by powers such as the United States. Andorra, 180 square miles which means it's 1/2 the size of New York City. 20,000 population. Their economy is tourism and sheep grazing. Monaco, 30,000 people, 600 acres. I think my daughter owns more land than that. Economy: tourism and gambling. Liechtenstein, 20,000 people, 61 square miles, the size of Washington, D.C.

Their economy is precision instruments that are exported and textiles. Nauru, 8 square miles, 7,000 people and their economy is that exportation of electrical production. San Marino, right in the heart of Italy, 20,000 people, 23 1/2 square miles; their economy is postage stamps, tourism, woolen goods, paper, cement. These are sovereignties that we recognize. Navajos, I want to ask you, tell us your population and how many acres and I'd like Mr. Chino to answer too. Also, tell them that Navajos sit on most of the uranium in the United States.

Redhouse:

Just about one-half of the uranium. Right now, the reservation proper is about 17 million acres. Our aboriginal homelands, say about 34 million acres. We lost half of our land through a land session treaty and there's about 150 thousand of us.

Power:

Mr. Chino, how many acres do the Apaches have?

Chino:

Four hundred and sixty thousand.

Power:

Any other questions?

[Unidentified participant]

Yes, could you decide not to let the U.S. Government have the uranium that's on your land? Why do you have to give it up?

Redhouse:

That's a good question. There are people that live in the Exxon uranium lease area that say that we have lived on this land for centuries. "It's our land" and the tribal government has no right no power to sell it out. They believe that the uranium should stay in the ground. And this brings in immediate conflict with the tribal government that says otherwise. It says, "we do have the power of eminent domain." "We can make decisions over your land use or whatever and compensate you for it." I think if you talk to the majority of the Navajo people that are living on uranium-bearing land, they would say, "No, we own and control this land. This tribal government is in cahoots with the Federal government and the corporations, and they'll be treated as such." You talk to the tribal government people and they'll tell you something different. The majority of the people that actually live on the land don't have any real right other than the right of land use. They don't have right to subsurface exploitation.

[unidentified participant]

In other words, it goes back to the government's retaining all land rights?

Redhouse:

They do have the power of emminent domain, although I don't think it has been expressly acted-out using such a phrase.

Wilcomb Washburn:

Did you ever run for the office of tribal councilman? If you haven't, why not? What's your reason for trying to get into the political process.

Redhouse:

Too young for one thing. I would like to see someone else run, someone else that is more familiar with the problems and the issues than I. My bag is advocating and trying to empower those people that are being affected by decisions made by tribal government, by industry, by government.

Washburn:

Do you represent a particular group in your seven years of experience with the Navajo Tribe?

Redhouse:

No I don't. I was Associate Director of the National Indian Youth Council for four years and I've been with different groups, but right now I don't represent anybody other than myself.

Power:

You represent a person and a Navajo.

Redhouse:

That's what I like to hear.

Pauline Strong, University of Chicago:

The problems that you're talking about are not only the problems of the 1980s for Native American groups but also the West as a whole. And there has been a lot in the national news lately about a town in Colorado, Crested Butte, which faces a massive fight to keep large areas of their land very near the town from molybdenum strip mining which is as bad as uranium in terms of the impact on the land. And these people have very little

recourse, probably even less than a tribal government would, because just a group of interested citizens or even a municipality finds itself in a very unviable position in trying to fight the Department of the Interior. And I'm wondering if there is much hope for Native American people and environmentalists and rural people to somehow band together in a larger fight than each group trying to work seperately?

Redhouse:

Absolutely, I think that the recent formation of a Black Hills Alliance is a very good example of that, where you have the Indian people in western South Dakota coming together with people that they were fighting against several years ago, like the rednecks of Custer, South Dakota. These white farmers and white ranchers were against the Treaty of 1868, and they were against AIM and all Indian movements in the early '70s. Now they are coming together because they feel they have a common enemy--a larger enemy that's going wipe them both out till the Red people and the White people come together. Of course the environmentalists have decided to boogie along. I've seen it at a very impressive conference, it was kind of like the sounding conference of the Black Hills Alliance in which everybody was talking about developing a whole bunch of strategies and a whole bunch of tactics to deal with a common enemy, people that are going to destroy the Black Hills, especially the multi-national energy corporations. This has served as a model for what is going on in New Mexico right now, where a lot of Navajo and Pueblo Indians are coming together pretty much for the first time with Chicanos and Anglo's-rural Anglo's. They'll all be affected by the same uranium beast so they are to coming together and formalizing the affinity that they have with each other. They have more in common than

they do differences, and to preserve their rural lifestyles against a common enemy. So I see that more and more, this kind of thing is starting to come together, even in Colorado and Wyoming, with a few uranium groups out there. They're inviting groups in, trying to build a broad base of coalitions to deal with the same kind of common enemy. Interestingly enough, the Lakota Treaty Council, which is part of the Black Hills Alliance, has gotten a lot of those rednecks and racists of Custer, South Dakota, to say, "we know why there's a Treaty of 1868, because that covers the Powder River Basin and the Black Hills, where 35% of the nation's uranium is , and what you were raising hell about six years ago is very valid, because the Black Hills perhaps can be taken back." The lawyers came out with an interesting concept called Accessory Land Claim, in which they said that they could make a legal basis for stopping uranium mining in the Black Hills right now based upon the Treaty of 1868. And you have these people of Custer, South Dakota, saying "let's get it on with the Treaty of 1868. You guys have been right all along."

Sondra Jones:

I think if you look historically at the American Indian and his demise during the early period, before the turn of the twentieth-century particularly, when the White people came in and pushed him back, and finally parceled out small sections of land, that this erosion of culture was due to two major factors: lack of power, both in numbers and the economic powers that Whites traditionally equate with power. It also includes the passive rejection that you've talked about. For example, the Utes of Colorado and Utah, but Colorado particularly: several of the tribes got together and Chief Ouray said, "we will sign this treaty," and

everyone else said, "Don't be ridiculous. We're not going to sign anything like that," and so they got in a huff and they walked out. So Ouray signed the treaty and the United States government accepted him as chief of the whole tribe. So with passive rejection, they all got the treaty anyway, whether they signed it or not and they all ended up on this piece of property nobody wanted in Utah. The passive rejection of things, whether it be traditional or not, ultimately leads to the person who will go along with the governing power, which happens to be the United States, doing whatever it is they want that leader to do--whether it is tribal chairman or whether it's so-called chief of all the Utes in 1880. We are coming up on the 100 year anniversary on that. And this unity in which the tribes would not unite as in Pontiac's War in this vicinity, where he tried to get so many people to unite together so that they could push the British people back. Had they all united and maintained that unity, the United States would have not been able to penetrate this area and colonize it. But they fell apart; they did not unite. We're in the same situation now. We have a reservation here and a reservation here, and a reservation here, and this chairman and that chairman. There's no common agreement. If the Indians are sitting on as much potential economic resource as is indicated here today, they have access then to economic power. If they could unite in a common purpose, they would have that kind of power also. And if they would not passively reject and leave the power they have to those who are willing to accept whatever the Federal government wants, then perhaps the American Indian could really revive himself as a major influence and reclaim sovereignty. But without that, I don't see how he can do this: maintain any kind of sovereignty at all. He will merely erode what he has with the economics that exist now.

Redhouse:

Right. There's something like that called the Council of Energy Resource Tribes (CERT), and its made up most of the energy resource tribes in the country. One of the criticisms that I've heard of it is that is was set-up by the Federal government. They get virtually all of their money from the Federal government and from energy corporations who do mineral inventories of all their resources on Indian lands. Once they get that information, those people who are putting money into the tribe are going to peel Indian reservations like an orange. Then there will be a few rich sheiks and impoverished masses. That's one criticism. And insofar as the coming together of one mind on things, we've had a hell of a time with that, uniting and organizing against. Even on the greatest threat to our existence: the anti-Indian backlash of 1978. Indian tribes couldn't come together on that. You had different groups and you have coalitions within coalitions to fight against the back-lash. You had UET, you have NATRO, you had three or four umbrella groups or umbrella coalitions to deal with all this stuff, and now you don't see it. I think that the threat to Indian sovereignty is very great now, especially now that we got the goodies that the larger society wants. The treaties of sovereignty, we've been bringing about these issues for a long time, but what they're all basically based on is all that we have left, and that's the land, the water, and the natural resources. That's what our struggle has always been about; and now, that we're in very extreme danger, there's no real one group to deal with all that's coming down. You have CERT, but I think the criticism that I've heard is very valid about CERT, and the fact is, there are some groups that won't even touch CERT right now because they see it for what it is. The Australian Aborigines have something like 80% of the

world's uncommitted uranium right now and they can't reach consensus either, and the uranium mining will be starting up pretty soon. They took a very absolute stand against it and now the chairman of the Northern Lands Council in Australia is just about to sell them out. He has pretty much. He has signed some agreements to date, and he's about to sign the real biggie. And there are some more militant factions within the Council that say that if he signs those papers, he's going to be done in by a spear. So we're not the only ones that have real problems in reaching consensus over what very little we have left.

Susan Power:

Excuse me, some of you that have asked two and three questions--could you give some others a chance and then come back?

Dr. Sol Tax, University of Chicago:

I've been a little disturbed not by what I hear any of my Indian friends say, but what appears to be in the minds of our young non-Indian people here, and I don't want them to go away as naive as they came. There's an old saying that people have which you've heard all you're life, "divide and rule." A Marxist would easily come and say, "well, this is a system by which you're dividing the opposition and then you're getting what you want." That's one possibility. The other possibility is as we do in the city of Chicago. We aren't able always to do the things we want, and when you finally have a little bit of an electoral revolution and get somebody else in power, she is likely to be in the same position as many of the others were, because everybody else is each still interested in what can he personally, he or she, personally get out of it, and there are limits to

what you're able to do. You're asking us here to say, well, "why don't the Indians just do it?" Well, why didn't we just do something before our Civil War or before Vietman, or before all the other things that we are unable to do even if we're perfectly democratic. If we don't bow out, there are lots of things that we aren't able to do, and we are making demands that somehow or other these little Indian groups be more noble, idealistic, wise,--whatever it is--and do things that are against the individual's perceived interest, his own perceived interest, in order for some larger social thing. Unite, and so on. We don't know the local situation as we talk. I am going to say something now that I probably shouldn't say in public. There are some people here--we have two tribes represented this aftertoon, the Navajos and the Mescalaro Apache. In the one case, we have somebody who is clearly out and represents a minority who is fussing against the wickedness, so to speak, of their elected government and you're complaining about him. On the other hand, we've got the president of another tribe who <u>is</u> the elected government; and in fact, one of his constituents told me not long ago that he and his government are wicked. We haven't been asking him questions--"why are you so wicked?" So, this happens to be, would be embarrassing in our discussion. The point that I'm trying to make however, we're not, none of us or them are wicked. What is the social situation that makes it?

And we haven't had a chance to learn very much about it in a discussion like this. And don't think you go away saying, "Indians can't unite," or "They've got factions," or this, that, or the other thing. Or "Give them a government and they don't know how to use it," as if we do, and so on, and kind of put the blame on them. Nancy Lurie wrote an article not

too long ago, which some of you may have seen, which puts it on the conscience of some of us anthropologists for always talking about the factions and difficulties that Indian tribes have. And she puts it down saying that they haven't had a chance to learn about political parties. We disagree all the time, but have worked out methods some way or other and what we should do to try to help them to get the concept of political parties which might be helpful. On the one hand, she's telling us not to blame the Indians. We've been causing a lot of the trouble by continually telling them that they've got something called factions which are bad, and of course the Indians all think this is bad. They've got factions. We have factions, but we call them political parties and have votes and get away with it. But the real problem, it seems to me with all of us, is that we are unable to support the Indian community in the right place. There's no use scolding them for what they are unable to do among the Navajo. We have to go to Congress and get ourselves different Congressmen. How many of you know the Congressman that represents you in Washington? Know him, and know what he does? It's Chicago Congressmen that would be most favorable to American Indians. The backlash isn't to their advantage. The Indians aren't trying to take away their fishing rights, so our Congressmen could easily be on the side of the Indians. How do we get them there? How do we move our own political system is what I'm asking, that can do some good for the Indians instead of our trying in this half-way house of being friendly to Indians but somehow or other assuming that they're doing wrong in the way they're behaving?

Susan Power:

Thank you Dr. Tax. I should have asked you to talk as one of our sincere, knowledgable, non-Indian friends. Thank you.

Redhouse:

I might want to clarify one thing. I certainly don't come here representing the Navajo Nation. However, if what I came up here for was to give myself a forum for some faction in an intra-tribal dispute, that would be one thing. But I'm saying that in talking to people out on the Hopi Reservation and also up on several other reservations in the great northern plains, there is a movement, there is a rising movement of young people and old people that is based on new thinking and new activism. They're talking about sovereignty in a different respect. They're not talking about trying to get redress within this country's political or legal framework necessarily, or talking about taking the issues to an international forum. They're talking about other bodies of law and not just suing for money instead of land. They're talking about possessory land claims. They're talking about new kinds of concepts insofar as discussions of treaties and sovereignty are concerned. A lot of this is based on the whole issue of energy resources. That is a whole new kind of thinking, a new kind of activism as we move into the 1980s and these aren't just intra-tribal disputes in question. I see this as being part of a powerful national movement that you people will be talking about maybe ten years from now.

Susan Power:

At this point, as Professor Ortiz says, we hate to interrupt this energy that is flowing so, but we're going to have to, so we're going to stop for

a coffee break and then I want to remind you, please come back. We're going to have an interesting summation of the conference.

Dr. Alfonso Ortiz:

Let me just make one brief comment to enable you to think about the summation and about challenging me, something which I would enjoy and welcome. I do hope that there is something worth challenging in what I say then. But I hope Dr. Jennings, the Director of the Center for the History of the American Indian here, will forgive me for making some preliminary contextualizing remarks regarding this conference.

Last October when the National Advisory Council, which consists of scholars and and other humanists, both Indian and non-Indian, convened here for what has become since 1972 an annual meeting, I am afraid I suggested that the theme of this spring's conference be, as I termed it then, "Land, Water, Energy, Sovereignty and Spirituality." These I perceive as the most pressing issues for Indian people as we move firmly into the last quarter of the twentieth century. Wiser heads prevailed and suggested that that is too large a bundle of issues to handle in one conference, and that the one theme which seems to underlie them all, namely sovereignty, be the focus. I readily acquiesced, because I knew that no matter where we started on that bundle of five issues we would soon cover them all.

By the way, Wendell, I think we owe that bundle notion to the great Shawnee chief, Tecumseh. He went around justifying his plea for unity by first picking up one stick and showing how easy it is to break that stick alone. Then he picked up a bundle of sticks and showed that he could not even break the bundle over his knee. Thus that bundle notion is a very good one, whether applied to Indian sovereignty or to the Bill of Rights, which concerns American or non-Indian sovereignty.

To repeat, it did not surprise me in the least that the discussion moved very quickly, almost as if it were a pre-formed thing, to include concerns of land, water, energy, and spirituality as well as sovereignty. This I expected, especially since the very persons I recommended to Dr. Jennings, with one exception, have been here today presenting papers and commentary. Spirituality is the aspect of the bundle that I would like to consider more fully after we reconvene. I do hope most of you will be able to return, for I would like not to just rehash things that have already been said, but hopefully to reintegrate them into a new perspective. I am glad that John Redhouse and, especially, Jim Henderson, have already prepared the way by establishing the relevance of Indian spirituality to Indian sovereignty. Jim did so not only in the content of his remarks, but in the form of his presentation, by not relying upon notes and outlines or even a microphone. I am afraid that I can not emulate that very well today, Jim, but I assure you that in the classroom I am like you, like to orators of the traditional times and traditional nations who walk among the people when they speak so that their words can live.

With that I would like to call for the fifteen minute adjournment, and then we will reconvene. Thank you.

Alfonso Ortiz:

OK. I guess we're all back together again or, at least, everyone here is settled. Oh good, I'm glad Wendell hasn't taken off in Mescalaro Air Force One. I was kidding him about arriving in a Mescalaro National Plane. I did not see you for a while there, Wendell. I thought perhaps you had to leave. I would not have been suprised if you did, considering how very busy you are. I will not assault your sensibilities for very long because I think all of us at this time of the day would rather be at the reception which will follow my brief remarks and any counter-remarks or reactions that you may wish to make. I will proceed by teasing something out of each paper in the order of their presentation, and then I will try to summarize the concerns of this conference with a few general remarks. The papers are all so rich that I could dwell at length on any one of them, although time prevents me from doing so, and I want to thank each of you who delivered a paper for providing us with provocative and well-stated positions that help us to think afresh about the timely and difficult issue of sovereignty as it pertains to the Indian peoples of the United States.

Perhaps the most valuable single thing in Dr. Jennings' lively, incisive, and, as usual, splendidly ironic presentation on "Sovereignty in History" is his pointed demonstration that it is necessary in the understanding of English and American history to disentagle legal theory on sovereignty from its utilization in historical events. That sovereigns are not really sovereign, and certainly not absolutely so or at least no so for very long, has quite contemporary reverberations, as John Redhouse's presentation suggests. Differences between English and Indian notions of sovereignty are behind some of the difficulties traditional Indians have had

with their tribal governments, and Dr. Jennings has done a great service in helping us to see more precisely the relation between English notions of sovereignty and power, understood in a purely physical sense. For Indians sovereignty is most often related to spiritual power, as the presentations of John Redhouse and Jim Henderson suggest, and I will develop this point shortly.

I like to think of Dr. Jennings' paper as demonstrating that the Indian notion that "white man speak with forked tongue" is well-rooted in English legal theory and practice. It also makes it clear that the forked tongue of the English was extended here upon this continent very quickly. Now, this English ability to distinguish facilely between theory and fact, between, in other words, policy and practice, has been one of the primary sources of great suffering by Indian people. Indians in colonial times, the records attest, usually assumed that English colonists meant what they said, that, like Indian leaders, English leaders were the embodiments of their words. But Indians sadly began to discern what is now all too clear in retrospect, that English leaders were not their words at all, and often did not mean what they said even at the time they spoke. Rather, the English used words merely as temporary expedients to gain an upper hand, or as a means by which to bide their time in the face of superior Indian numbers until they were in a position to enforce their own will.

The distinction Dr. Jennings has so lucidly drawn between the colonies' claim of sovereignty when facing toward Indians and their lack of sovereignty when facing toward England, and the later but parallel distinction between the sovereignty of the nation versus that of the states, is squarely

at the root of the duplicity that led to heartbreak, dispossession, and warfare in the past and poverty, alienation, and complicated legal tangles today. Rather than mitigating the force of such an assessment by comparing the English record to that of other colonial powers, as Dr. Washburn suggested, I maintain that it is quite appropriate to judge the English and Americans according to how their practice matched their own ideals.

To touch all too lightly on three additional issues raised by Dr. Jennings' paper, I should first like to mention that in my reading between the lines of history (as all Indians must do), the fact that many of the original English colonies had charters that granted them unlimited land into the interior of North America has helped me to understand why there was such an insatiable greed for land, one entirely incomprehensible to Indians at that time or since. This unending lust for land cannot be understood unless we see that America was in the process of being chopped up and sold (almost) in the earliest stages of the English invasion and exploration. Honest and sensitive historians are now pointing out that, contrary to America's cherished myth of Daniel Boone hacking his way through the forest, the movement westward was often led by surveyors sectioning off land so that wealthy investors, including some of the most respected "fathers of our country," could peddle it off to the landless European peasantry who were pouring into the country from its eastern shores.

I also appreciate Dr. Jennings' demystification of John Marshall. So many younger Indian scholars see John Marshall as the father of sovereignty, but it is important to observe, as Dr. Jennings does, that in an earlier stage Marshall was defining Indians as savages and then turning right

around and saying that the law of nations could not apply to Indians precisely because they were savages, It was a perfect self-fulling myth, quite convenient for the expansion of nationalism in space and scope. And, finally, I do believe that we anthropologists should consider seriously Dr. Jennings' view that our distinction between social and political organization is a hold-over from myths of savagery such as that of Marshall. Modern political anthropology has challenged this distinction, at any rate, but the genealogy of the notion adds even more strenth to their position.

Dr. Jennings' irreverent attitude toward the law has been nicely balanced out for us by Mr. Lazarus' clear and precise review of "Tribal Sovereignty Under United States Law." Mr. Lazarus reminds us the "law is the real world," that it is the world with which he and his Indian clients must deal. It is true, of course--and here I underscore points made by Mr. Henderson and Mr. Redhouse--that Indians quite rightly wish to define their own sovereignty in terms very different from the definition that has been imposed upon them and the rather slim pickings that have been left to them. What is sovereignty, the sovereignty defined by Felix Cohen, we must ask, without the power to enter into treaties with foreign nations or to dispose of land without restraint? Well, Mr. Lazarus has shown us that even in the absence of these two powers tribal sovereignty entails a great deal, and I am grateful to him for conveying to us laymen the subtleties and complexities of the legal meanings of tribal sovereignty as interpreted by United States law. Mr. Lazarus very carefully brought us right up to date on the meaning of tribal sovereignty in legal terms, and his comments about contemporary developments confirm that this is indeed a central issue for Indians of our time.

I have one remaining question that I would like to ask Mr. Lazarus to address, if he would, after I have finished my summation, and it is this: It is clear to anyone with an historical sense in Indian affairs that there are permissive climates and oppressive climates, and that we seem to be in one that is, to say the least, not very permissive with regard to Indian affairs. There is presently a view of Indian rights that is not very positive in the Congress nor, certainly, out in the hinterlands, for it is there that the sentiment really began. I refer not only to the backlash movement out of the Northwest, but also to proposed legislation that threatens us in Congress, legislation such as the so-called Sunrise and Sunset bills. As least they are using natural imagery; that is all that can be said for them. From your perspective as a Washington lawyer for the last quarter century and erstwhile professor of law at Yale, and from your historical readings, what do you see as the elements contributing to a climate of tolerance verses one of oppression? What, in other words, goes to make up what Wendell Chino called the "roller coaster treatment" of tribal sovereignty?

Mr. Youngblood-Henderson has eloquently challenged the English and American notions of sovereignty and conquest insofar as they have been applied to Indians, and has spoken for many Indian cultural traditions in emphasizing that political power is necessarily based upon spiritual power. Instead of sovereignty, he prefers to think in terms of Native American conceptions such as the chain, the road, the fire. He conveyed a sense of urgency that the young become aware of their own native legal, political, and spiritual heritage. There is no reason for me to repeat his well-delivered message, especially since I will touch upon some of the same

things in my closing remarks. I do, however, wish to exercise a privilege I recently attained in turning forty and provide a measured view of Felix Cohen viewed as a scholar and humanitarian in the context of his own time.

If any of you have read Cohen's essay "Americanizing the White Man", which appeared in the American Scholar, the forum of the Phi Beta Kappa Society, in 1952, you know that Cohen was an individual who was a generation ahead of his time. In the heyday of relocation and termination Cohen was openly discussing issues that we are just now beginning to rediscover and appreciate. The essay overturns ironically the overriding concern of the time, how to "Americanize" the Indian, and pays homage to the diverse Indian cultures of North America for the contributions, mostly unacknowledged, that they have made to, yes, Americanizing the white man to Native American culture. Material things like corn flakes, bubble gum, squash, and beans have long been acknowledged. But things like the word "okeh", which became "O.K." in American English to signify consensus, a distinctly American approach to decision-making, things like this are openly, freely, and gratefully acknowledged by Felix Cohen.

A second historical note I would like to add involves the Indian Reorganization Act constitutions, which have been much flayed in this forum as a kind of generalized embodiment of evil. Those of us who were around in the 1930s or even the early 40s know from our own and our parents' experience that, given the conditions on Indian reservations and in the country at the time, the IRA constitutions were the only things that permitted continued community integrity. I fully well realize, when shifting gears to a contemporary perspective, that many IRA constitutions

out of the 1930s have been found to be wanting, very wanting indeed in many particulars. They have not kept pace with the rapid sequence of events that have overtaken Indian communities, especially those which preside over our dwindling unexpropriated water sources and those which sit atop some of the nation's greatest caches of untapped mineral and energy wealth. But, all of this said, it must be stressed that these constitutions can be altered, can be brought up to date. These is nothing, as Mr. Lazarus has also pointed out, that prevents these constitutions from being amended by the Indian people who live under their provisions, especially in the context of the present policy of self-determination. I hope, indeed, that this is one of the things that will come about, given the sentiments that John Redhouse has reported to us. There is such deep, deep disenchantment on not only the Navajo, but on several Western Indian rese -ions--reservations which, because of their size, the numbers of their population, or their traditions, have provided leadership or have been at the forefront of developments in Indian affairs generally--that if the constitutions are not made more broadly responsive, perhaps the Indian people will indeed throw the whole thing out and start all over again. And, who knows, that may not be such a bad thing. Some of the best things in life come from revolutions, and there are those who would hold that some systems of government need periodic revolutions in order to keep them accessible and responsive to the people. Indian governments may be no exception in this regard.

I do not mean to discuss the issues raised by John Redhouse out of -, however. Because we are now so aware of environmental dangers--have you heard, by the way, that the National Park Service has just announced the opening of a new national park in Pennsylvania called Three Mile

Canyon?--I think we all leapt too quickly over Wendell Chino's very statesmanlike view of the importance of sovereignty from the standpoint of a long-serving, much respected, even revered, tribal chairman and national Indian leader. As did Susan Powers, I looked up to Wendell Chino when I was still cutting my teeth on Southwestern regional Indian youth councils, and it is indeed our privilege to have with us a man who has worked energetically and conscientiously for the benefit of the Apache and all other Indian people. It is just this long history of service and sacrifice that enabled Mr. Chino to observe, so truthfully and so well, that tribal sovereignty comprises a bundle of the most important, the most essential Indian rights that we have and need to defend; that it involves an inherent right that Indian people must continually struggle to keep in order to live in the diverse ways they choose, according to the visions of their forebears. Here the presentations of Mr. Chino, Mr. Jennings, and Mr. Lazarus come together, and we see that sovereignty can be viewed in terms of those inherent rights of a people that they have successfully been able to claim and hold against those who would take them away. Though these speakers expressed sovereignty in terms of power, we can see that it can also be seen in terms of that cherished word "freedom." It involves that quest which has been with us from the beginning, to get the white man's heel off our necks and to keep it off as much as possible. I will return to the issue of freedom in my more general observations, but only after I pay tribute to the very dignified and compelling presentation made by John Redhouse.

At the outset I want to commend Mr. Redhouse for providing us with a paper that cuts right to the heart of the critical contemporary issues,

and, above all, for his quiet passion and statesmanlike response to rather heated challenges from the floor. Although Mr. Redhouse's compact presentation called forth lengthy and lively debate on many fronts, surely the essential issue cannot be disputed: that is, the massive threat posed today by energy development and the backlash movement to Indian sovereignty when viewed as the control of Indian peoples over their own land and lifestyles. Indian people are facing a challenge and an opportunity as great as any they have ever faced, and our discussion has highlighted the fact that there are no easy answers. Our discussion also wended its way to a recognition that we are now, indeed, all in this together.

When we are talking about removing uranium from the earth and polluting the heretofore beautiful, open blue skies of the Southwest, it is no longer an issue of Indians versus whites, but one of deeply concerned people united by a profound threat to the quality of our lives and those of our children. The kind of issues that are gathering force in the trans-Mississippi West cut across the grain of all of us, and we must all take the proper interest. I am disturbed very often by the "us-vs.-them" tenor that discussion of Indian-white relations so quickly take. I am sure that the multi-national energy combines would like to see us slay one another: environmentalists against Indians; farmers and ranchers against environmentalists; campers, backpackers, and fishermen against another artificial entity. This is why I am so appreciative of the timely observation made by another senior statesman who has been with us for a very, very long time, Professor Emeritus Sol Tax of the Department of Anthropology at the University of Chicago. Dr. Tax has fought with us on the same side, way back to the time when it was not popular to do so, when it was, in fact, a

professional liability to take the side of Indians on any issue. As Mr. Tax, Mr. Redhouse, and other members of the audience pointed out, we must move beyond our former divisions. There are people of good heart and good will on all sides, and neither race, gender, national origin, nor creed really determine which side of a given issue people will take. Those of us who have been around for a while know this; we find our friends in some very strange places indeed.

I called this an issue primarily of the trans-Mississippi West, and I would like to make one further observation on why this is so, if I may speak womewhat ironically myself, Fritz. If we take a large overview of what has happened in American history, especially in the nineteenth century, we see that in his haste to overrun the continent, to join the two oceans, to fully straddle the American landmass, the white man overlooked a few places such as deserts and high mountains, and let Indian tribes remain or take refuge there in peace. Well, these areas that were not taken, stolen, overrun--the high mountains and desert areas, the forbidding areas of the trans-Mississippi West--are now found to contain vast untapped energy resources. In the case of uranium they hold more than half of the nation's known reserves. Thus, the question now facing an energy-hungry nation is how to take these resources while preventing the "civilized" world from recognizing it as blatant thievery. This is what we are facing in such enterprises as the coal mining on the Cheyenne-Crow reservations, the uranium mining on the Navajo and Laguna reservations: evolving ways of getting at Indian resources without seeming to be repeating the depredations of earlier centuries.

The resources of land, energy, and water are linked, because water is needed in order to mine coal in commercially feasible ways. As there are no large quantities of unappropriated waters left in the trans-Mississippi West, those of us watching water rights litigation are concerned. This is because the water has to come from somewhere, and historically the resources of Indian people have been most likely to be tapped in such a time of need, as we are numerically the weakest, politically the least powerful, and until recently, the most invisible group in American life. If we have a commodity needed by the majority, it is likely to be taken from us rather than from some group with a more powerful lobby, more sophisticated spokesmen, or with more resources to pay for those lobbyists and spokesmen before the nation's tribunals and legislative bodies.

This is the threat to Indian land, sovereignty, and spirituality posed by the industrial world's need for more energy and water to keep itself in operation. Indians, who still as a whole derive the least benefit from the commodities of the industrial world, are paying the price. Let me mention only two facts that convey the dimensions of that price: the Navajo sheep which bleed from their nostrils because of the inhalation of the dust from the Black Mesa coal mining, and the frightening number of Navajos who have worked on uranium mines and are now coming down with cancer or have already died of cancer. Very young Navajo women, in their late thirties and early forties, are becoming widows, presumably because there were not sufficient safeguards in the uranium mines in which their husbands worked. It is from daily experience with victims such as these that John Redhouse derives at least part of his quiet sense of outrage.

With that I would like to make some very general observations. The essence of the issue of sovereignty--what to think about it, what to do about it--seems to me to revolve around the question of what definition we accept. You may have noticed a shift from the morning to the afternoon session in the way sovereignty was discussed, anticipated by Mr. Henderson's commentary upon the morning session. Just as there is a need to disentangle legal theory from historical fact and to understand the complexities of the concept of Indian sovereignty in United States law, so also there is a need to be somewhat clear about what one means by the traditional Indian concepts most analagous to sovereignty. The first three papers have stated bluntly that sovereignty means power and the right to exercise it, and they clearly mean political power. But I agree with Mr. Henderson that if Indian sovereignty is to be conceptualized in terms of power (and, as I shall make clear later in my commentary, I am not sure that power is really at the crux of the issue), it is not political power but spiritual power that is central to traditional Indian concepts that may be seen as analogous to the English and American concept of sovereignty. There may be some disagreement by traditional Indian people in the room, but it here that I, at least, find a tie-in between sovereignty and spirituality. Terms like the Iroquois "orenda," the Algonquian "manitou," the Sioux "wakan," the Navajo "hozho," and the Tewa "pinan," refer not to something that is orientated to the control of people and institutions, or to the manipulation of anything, but, rather, to the quest to know and to understand the workings of the world. Spiritual power is something vested not in tribal councils and chairmen but in the solitary dreams and vision of elders. That it to say, the most respected traditional power has been vested or recognized in peace chiefs rather than in war chiefs.

It is unfortunate that, because of different understandings and meanings given in the past to such basic concepts as power, there is so much misunderstanding when traditional people and scholars get together, or when those who are or have been culturally Indian get together with those who would like to understand them. I wish I had time to explore the implications of notions like the one I understand well because I grew up with it, the Tewa notion of pinan. It Tewa it means "a strength of heart;" literally translated it means "there is heart." It is a very profound religious concept that essentially states that the knowledge to which one should most aspire can only be gained through humility and self-deprivation, through very lonely quests, whether in dreams or in ceremonial activity or in pilgrimages. I suspect from what I know about the analogous concepts found in many, many other tribes (the few I gave are just well known in the literature), that every Indian group has some notion of this kind, and that it refers more to spiritual than to political power. My point in mentioning this in this context is that Europeans, when they came and did not find what satisfied their notion of a political entity with which to deal, went about creating such, or perceived those persons in whom spiritual power was vested in a political context. I have not forgotten, Fritz, again in reference to your paper, that the early Jamestown colonists expressed great admiration for Powhatan and his confederacy, and perceived attributes of European nobility in him and his lesser chiefs.

Problems with IRA constitutions and the political bodies they created are in part manifestations of the fact that in so many traditional societies when first encountered, there was nothing resembling a leader who would assert power and presume to speak for everyone. As John Redhouse has

demonstrated, this is most poignantly true in the Southwest, even today; one does not ideally seek power in this political sense. One takes it upon oneself only reluctantly and divests oneself of it as quickly as possible so that it will not corrupt one, or at least one recognizes that it should be dispersed and delegated as much as posslble. On the other hand, the American political process, as fast as it moves, and as quickly as it demands decisions, works in the opposite direction. So it is not at all accidental that there has not yet been time to digest and control the institutions created by the Indian Reorganization Act and still others which have appeared at a very dizzying pace within the last fifteen years, let alone the hunger and demands of energy combines. Due to the programs that Lyndon Johnson's "Great Society" unleashed suddenly upon Indian reservations, there has been a maddeningly accelerated pace of new responsibilities, new forms, new regulations, new acronyms--CETA, TWEP--and new agencies to deal with these incredible federal programs emanating out of Washington.

For example, I come from a Pueblo that had in 1964 approximately seven hundred people. Now it has well over a thousand. No, the birthrate has not taken a tremendous jump. People who earlier were forced by lack of jobs to go on relocation to California or Chicago or Cleveland or Dallas or Denver in the 1950s have come back because they have received letters over the last dozen years or so assuring them that their talents and skills were indeed needed, and that they could find gainful employment at home. This is because of these poverty programs and new kindergartens and Head Start programs, and the like. Moreover, while once we were only under one federal agency, the Department of the Interior through the Bureau of Indian Affairs, over the last fifteen years there have been added HEW, HUD, the Department

of Commerce through the Economic Development Administration, and the Department of Labor through various work-incentive and other programs. And I probably have left out one or two cabinet-level agencies. Indian people have to deal with all of these, and one of the things implicitly said here today is that tribal governments are groaning and straining in trying to understand all of this. I do not know how you do it, Wendell, I really do not, because when I see what has been proliferated in the average-size Indian community over the last decade and a half, I find it frankly mind-boggling. And it will be another generation before anthropologists begin to understand it, for we are usually a decade or two behind in our ability to comprehend what the internal dynamics of Indian communities are at any given time.

All of this is not to say that American notions of power are not also understood and found in even the most traditional Indian communitites, for they are. I only mean to say that those notions are hard to swallow, because traditional Indian people in all of the communities of my acquaintance are not comfortable with ordering their kinsmen around, with assuming control over their lives and destinies. Among the many modern Indian communities that have only recently been visited with the demand for Western notions of power and the manipulation of institutions and resources, much of the corruption, suffering, and pain that are found are best understood as growing pains. They are essential, unavoidable growing pains along the way to finding the middle creative path, as Mr. Lazarus suggested to me during the interlude, between the challenge of maintaining viable economies which provide jobs, homes, and desired amenities for their people, and keeping their way of life, or as much of it as possible, intact

and ongoing. That is another way of restating the most sublime challenge facing Indian communities today. There is sure to be development of some kind. What kind? How much? At what rate? Under whose terms? These are negotiable questions, and I think we have had a good spectrum of opinion expressed on that issue.

To recap, the Indian cultures with which I am acquainted tend to view power as primarily a spiritual rather than a political or physical matter. However, I believe that there is a concept even closer to the heart of sovereignty for Indian peoples than power of any kind, and that is freedom. But this is a notion of freedom that differs from the American ideal of individual freedom, of the right to come and go as one pleases, to own property and to accumulate material possessions, and the like. In Indian notions of freedom insofar as I understand them, freedom means, rather, to have the group, whether it be defined as band, tribe, community, or nation, as given for its support and nurturance, rather than to be free of its constraints. Freedom in Indian communities involves most essentially, I believe, the right to live in the community of one's birth, in peace and with dignity, without external interference or regulation and, certainly, without repression by external force. Now, on the surface the American and Indian ideals of freedom may seen to be perfectly compatible. Actually, however, they come from and point to different directions. One aims for the preservation of individual rights and responsibilities. The other aims to keep the group and its interests at the very forefront of concern.

To clarify this difference in the ideal freedom, I would like to break it down into three major value differences. They are not absolute differences.

There is no need for polarization; the need, instead, is for mediation. Nevertheless, the notion of freedom as believed in, promulgated, and practiced by Indian communities in contrast to the prevailing American notion involves at least the following three broad areas of value differences, relatively speaking:

The first difference, as I have already mentioned, is the placing of the group and its interests above that of the individual and his or her interests. This has served as a reason for considerable mutual estrangement in the historic confrontation between Indian and American communities. A second and related difference in that Indians generally emphasize sharing rather than hoarding. This raises all kinds of hell with the American, The Horatio Alger, ethic. Many shibboleths of American culture express the ideal of seeking one's fortune, of making it, of measuring one's success in whatever field of endeavor in terms of the quantity and quality of one's material possessions. In Indian communities, on the other hand, there are always levelling mechanisms.

I do not think Charles Loloma will mind if I use him to exemplify this point. Charles Loloma is probably known to most of you as an immensely skillful, innovative, and successful Hopi jeweler. He has his own Hopi Air Force One and Two. As I seem him disappearing into the western sunset in one of his two airplanes I cannot help but think of that little phrase, "lo, the poor Indian." I hope Charles will not be too upset or embarrassed by talking about him in this way, but Charles is one of the most economically successful Indian persons in the United States. But he is also a traditional man living on the edge of what is probably the most traditional

Hopi village, Hotevilla. He is the Powamu chief. In him is vested the continuation of the Powamu, the Earth Regerminating, Earth Reawakening, ceremony of the Hopi people. He comes from the appropriate clan and the appropriate lineage within that clan to hold this position. And the following he told me with no resentment whatsoever, because this is the way of having and sharing in Indian communities: the Internal Revenue Service once wanted to assess Charles on his gross income, but his gross income is totally meaningless because the clan and the community and his religious obligations siphon off so much of it. The levelling mechanism inherent in Indian communities obliges those who have more to use it in order to upgrade the quality and standard of life in that community as a whole. If one wants to accumulate material riches for oneself, one does not live in a traditional Indian community. Charles just happens to earn so much that he can share in this manner and still have all of the amenities he wants. His Jaguar is probably the only one in the world with a prayer feather dangling from the rear view mirror. He probably is the only Indian person in the world who interrupts the opening of a show of his jewelry in Paris attended by all of the top Parisian citizens because it is time to go out to sprinkle corn meal toward the direction of the sunrise and pray.

Enough of that; I enjoy telling Charles Loloma stories because he is such a unique individual. The point is merely to illustrate that there are imperative levelling mechanisms in traditional Indian communities that prevent one from hoarding one's material wealth. Most of these mechanisms involve ritual; you all know of the give-aways, the throwing of food, the honoring of visiting digitaries by presenting them with a blanket or horse, or, these days, with a basket of food or a collection taken at a powwow.

These are the kinds of levelling mechanisms of which I speak, and the more someone has, the more he is subject to these mechanisms.

The third relative value difference of which I want to speak is also implied by the first two. This is the value placed upon cooperation rather than upon competition. There are not many highly aggressive tribal chairmen, because when they are in their own context, in their own communities, they must find the way by consensus rather than by opposition and competition. Again, this has raised all sorts of problems for traditional Indian children entering American schools. I am sure that most Indian people in this room over thirty years of age remember the well-meaning but uniformed elementary school teachers who offered gold stars to the goody-two-shoes in their classrooms. They did not know that in Indian communities those who receive gold stars are likely to be the ones who get beat up after school or in the washroom at recess. This is another kind of levelling mechanism. One does not set oneself apart or ahead; one brings along the others. If one has more ability than others, if one is more facile of mind than most of one's classmates, one helps them and thereby brings them up to one's level. There is some of this also, as you know, in American culture; the resentment of the goody-two-shoes, the teachers pets. Like the others, this is not an absolute difference, but a relative one. However, it is based upon very basic and enduring values in Indian communities.

To summarize in closing, when I hear Wendell Chino declare that sovereignty is something that we have always had since long before the coming of the white man and that since then we have been struggling to

preserve and defend it, I understand him to mean, more broadly, the kinds of freedoms that we cherish. These freedoms are not exactly the same as the American ideal, and this is one of the reasons why the ideal that so many in this room take for granted has been resisted or even rejected at times by Indian people. Many whites have wondered and agonized over why this is so, but it is simply that sometimes our ideals and American ideals conflict against each other because we are starting from somewhat different premises and aiming toward somewhat different goals.

That is enough for now. I do hope that the publication to result from this conference will be every bit as interesting as this forum has been.

Ortiz:

While our speakers and our discussants are all still here, I will just relay any questions you may have to whomever is appropriate.

Susan Power:

It was very hard to try to keep your child in tune with all those values. Now my daughter is seventeen and has been accepted at Harvard, but when she returns to our reservation, what will she do? Will she have to latch onto a government program? I want, I hope that she will be chairman of the board of a corporation. I want her at least not to have to stop at a government program where we end up by cutting each others throats. It's pretty hard isn't it?

Ortiz:

Every day you see something that threatens what you define as the core of

your being, and there are always many, many forces out there to corrupt or to blemish these ideals. These ideals are, I suppose, no more than approximated in practice in Indian communities today. I do not presume to the full practice of them anymore, but I did start there. I was one of those whom, before I became so big at the age of thirteen, was beaten up a few times in the sand lots and in the arroyo for rushing to the board with the answer to an addition problem the moment the teacher finished writing it on the board. I had added the numbers in my head without even trying. I was not showing off; I was just bored and wanted to get it over with. So, of course, that put me in a high gold star bracket, and I saw the consequences. There are even more subtle ways: when you play softball, the pitcher will aim at your head. (LAUGHTER) (Not consciously). So it is a very real problem, and I have met people who have had the same kinds of experiences who were raised in communities as diverse as Sioux and Iroquois and Cherokee and Navajo, Apache, Pima, Hopi, Zuni and the like.

John Aubrey, Curator of Special Collections, Newberry Library:
What is the difference between individual freedom or individual sovereignty and the sovereignty of the group?

Ortiz:
It is not actually so illusive. I think that the most brilliant and easily understandable exposition of this is the collection of essays by Dorothy Lee entitled Freedom and Culture. She does not state it in just this way John, but the essence is that the most perfect freedom is that in which one can take the group as a given, as a [illegible] protector; that the individual is set most sublimely free within the context of a group whose supportive

presence he or she can count upon. If Indian people were to articulate their beliefs in this manner, it would be to say that they feel most free when they are part of the group under the conditions of upholding its existence and values. What we term tribal sovereignty, then, is simply upholding the vitality and integrity of the community, even if it costs some individuals in material comforts and individual recognition. For the people who choose to live within Indian communities it is worth the cost because the support of the group is so valuable. If you need any evidence for the pervasiveness of these notions, I need only remind you that this has also been stated by our three other Indian speakers in very different, but complementary, ways. This, indeed, is how we survive. Through upholding group values Indian communities have survived pestilence, conquest, wars, and all conceivable manners of subjugation, oppression, control, and regulation. As a matter of fact, I think that the dependence upon Washington is the greatest threat that Indians face today, certainly greater than pestilence and flood or famine, and in this I think I am in keeping with the majority sentiment around the country. But, speaking of Washington, I would like to give Art Lazarus the opportunity to respond to the inquiries I made and so thoughtlessly almost overlooked. Art.

Lazarus:

Al promised me two questions but I wrote down only one.

Ortiz:

I thought the other one was not important enough to bother you with. (LAUGHTER)

Lazarus:

But I'm going to take the time then to make comment because Al's very moving presentation on the spiritual power of traditional Indian community reminded me of a famous comment that was attributed to Stalin during World War II. When he was told that a particular course of conduct he was advocating would be opposed by the Pope. He said, "The Pope, how many divisions does he have?" (LAUGHTER) And I'm afraid that the spiritual power is a force but the decision making is made by the military power, at least to a large extent in the dominant society.

Sol Tax:

Would you say that goes for Iran?

Lazarus:

Well, we have yet to see what's going to come out in Iran, and as to whether we didn't or whether Iran didn't trade one military power for a different military power. We're just in a transition state there now. But in answer to the question that Al asked which is, "How do you explain the obvious ebb and flow in relations between the government and Indian communities in a time of permissiveness, a time of depression, a time of freedom, a time of regression?" Why do these come about? Well, I think in general they come about because the United States never has developed a satisfactory Indian policy. So the government keeps trying new Indian policies. Starts one, it doesn't work, starts another, that doesn't work, sometimes there's two or three different policies operating at the same time. Just that there never has been either a consistent or a thought-out or a logical policy of the Federal government towards Indian communities

and that is why, in general, we see changes that sometimes are inexplicable but changes nonetheless in this constant ebb and flow. Felix Cohen used to describe Indian policy as the litmus paper for the attitude of the Federal government towards all minority groups in the community. And that if the litmus paper turned insofar as Indians were concerned, you could bet your life that it was going to turn for other people sometime thereafter.

There is now a change in Federal policy towards Indians and this one, it seems to me, stems from two sources. We've had the period of Termination and that was overcome and then there was the beginning of the Great Society; actually these changes in policy do not follow changes in administration. Termination, for example, had its roots in the Truman Administration and then carried over into the Eisenhower Administration and the shift away from Termination occured at the end of the Eisenhower Administration, even though in practical consequence it was not fully perceived until the early days of Kennedy-Johnson Administration. And then again I think it's probably true that the shift that is occurring now had its roots in the late days of the Nixon Administration rather than in the coming of the Carter Administration. We don't follow those political lines. Now why the shift now? The so-called backlash? Well it stems from two things: that more and more groups in American society are competing for goods and services and there is less to go around. This is a budget-cutting administration that is looking at "sunrise" and "sunset" legislation to cut down on Federal programs and Indian programs where there is not a powerful--there is a political force-because Indians are a political force, but not a powerful political force constantly seeking to and obtaining increased appropriations--we see even if the appropriations are held at dollar level, that

because of inflation, they buy less. So there is that particular pressure on the Indian communities: that they're looked upon as communities that are receiving assistance from the Federal government and are therefore subject to the constant nudging of somebody else who wants it.

The second thing is that because of two events in the legal area that occurred at different ends of the United States, Indians are perceived by different people in the community as presenting a threat to their own way of life. When I say different people in the community, what I mean is that in the eastern part of the United States, there was in all the time that affirmative Indian programs were going forward, there was support from the East in the establishment from the East and members of Congress. There was also support in a place, let us say, like California. But as a result of Indian successes in the courts, the non-Indian society there perceived that what it had was being was threatened. There's a substantial different between adding on to the pie and now making two pies instead of one; and, if the pie is increasing in size and Indians are getting a share of the second pie, that's much less of a threat than to somebody who perceives there to be a single pie and if the Indians share increases, that man's share decreases. And that's the way Indians are perceived in these two areas, the eastern United States where land-holders felt that title to homes and businesses and land titles were being threatened as a result of the suits by the Eastern Indian tribes, and of course on the west coast, as has already been mentioned, the threat that the sportsmen and the commercial fishermen felt as a result of the fishing rights cases. So that has been a combination which has made it very difficult to get affirmative legislation in Congress, and as a matter of fact, has resulted in reductions in appro-

priations in areas that you don't ordinarily see. For example, Senator Magnuson is Chairman of the Senate Appropriations Committee, and it was as if the direct result of that position that he held and the pressure put on him by his western Washington constituents has resulted in a reduction in appropriation in the Bureau of Indian Affairs Office of Trust Responsibility. Those things you can see as an immediate result of the "backlash." That is actually a much more serious threat to Indian communities than aberrational things like the Cunningham Bill. The Cunningham Bill was a sport--this was the Congressman who was the most junior member in a minority party and he got elected by a fluke, stirred up a lot of controversy and in the next election he got defeated. And a lot of the tension was focussed on what he had done, when the attention more profitably could be focussed on what Senator Magnuson was doing, for that's where it really hurt.

But in any event, that's the flow we get now, and sooner or later the fishing rights issue will be resolved. Sooner or later the eastern land claims will be resolved, and if something new doesn't come down the pipes, then we probably will see the pendulum coming back the other way again. (APPLAUSE)

Ortiz:

Thank you very much. Most of us are just mystified by the workings and misworkings of Washington and I think you've shed a good deal of light upon what is on the horizon, the immediate horizon anyway. More than that we can not ask you to do. Are there questions, queries, comments? Then let us adjourn downstairs for the reception. Whom are we receiving, anyway?